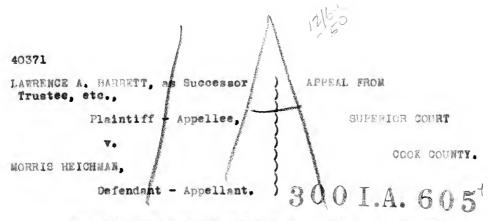




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FEB 9 '61



MR. PRESIDING JUSTICE DENIS E. SULLIVAR DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with causes numbered 40370, 40372, 40373 and 40374 in this court. We have today filed an opinion in cause No. 40370, entitled, Lawrence A. Barrett, as Successor—

Trustee, etc., Plaintiff-Appellee, v. Mark Shanks, Defendant-Appellant, in which the decree of the Superior Court was reversed and the cause remanded with directions. The facts and circumstances in that case are similar to the instant case and the law controlling in that case is applicable to this case.

For the reasons stated in cause No. 40370, aforesaid, the decree of the Superior Court is reversed and the cause is remanded with directions to permit the defense to place the cause at issue and to try same before a jury.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

HEBEL, J. CONCURS: BURKE, J. DISSENTS.

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LAWRENCE A. BARRETT, as Successor Trustee, etc.,

Plaintiff - Appellee,

SUPERIOR COURT

COOK COUNTY.

REINHARDT VOLKHAR,

Defendant - Appellant.

300 I.A. 605

PPEAL FROM

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

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MEASL. J. CONCERS.

LAWRENCE A. BARNETT, as Successor Trustee, etc.,

Plaintiff - Appellee,

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R. A. GARDNER,

Defendant - Appellant.

APPE A FROM

SUPERIOR COURT

COOK COUNTY.

 $1300 \text{ I.A. } 605^3$

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LAWRENCE A. BARRETT, as Successor Trustee, etc.,

Plaintiff - Appetree

J. D. WALLACE,

Defendant - Appellant.

SUPERIOR COUST

COOK COUNTY.

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MERCI, J. J. 1983.

PHILLIP BRERNER.

(Plaintiff) Appeld

SUPERIOR COURT

COOK COUNTY.

LINCOLN DAIRY COMPANY, et

(Defendants) Appellees.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered May 35, 1936, sustaining motions to dismiss the amended complaint and dismissing the cause.

Phillip Brenner, plaintiff, who was a judgment creditor. brought suit against the defendants. The defendants filed motions to strike the amended complaint, which motions were sustained and the case dismissed at plaintiff's costs.

The allegations of the amended complaint admitted by the motions to dismiss, are, in substance, that the Lincoln Dairy Company was incorporated February 24, 1933, and continued to operate under its charter in Chicago until June 18, 1935, when it was dissolved by Superior Court decree for failure to pay franchise tax. Prior to its incorporation, defendants Max Riffkind, Irving Riffkind and William Riffkind, were doing business as partners at 1925 South Kedzie Avenue, Chicago, owned and were operating machinery, equipment and motor trucks in conducting a milk and dairy business. These defendants were the original subscribers and stockholders of the Lincoln Dairy Company, and it is alleged that in obtaining the charter, they grossly overvalued the partnership assets which they turned in, in full payment of the capital stock of the corporation, at a valuation of \$25,000. The value of the partnership assets did not exceed \$7,500, which the Riffkinds then knew, but they reported to the state that all the capital stock was paid in full. This capital stock was divided into 250 shares of \$180 each, and was

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issued as follows: 120 shares each to Maxwell and Irving Riffkind and 10 shares to William Riffkind, They elected themselves directors and continued to operate the wilk business under the corporate name from the same office as they had previously operated the business as co-partners. Following the dissolution decree of July 18, 1935, Maxwell, Irving and William Riffkind, together with Raymond Riffkind, continued to operate the same business in the name of Lincoln Dairy Company, as a corporation, from the same office and with the same equipment. Prior to the dissolution decree, they pretended to be the owners of the property and assets of the corporation, and attempted to place the property beyond the reach of creditors by mortgaging it for \$1,316.10 to secure a pretended indebtedness which did not exist, and the note which the mortgage was given to secure was without consideration, and was for the purpose of protecting the property from the liens of creditors then and thereafter existing. While the defendants were operating the business as Lincoln Dairy Company, a corporation, they negligently operated and controlled one of the motor trucks then in their possession so as to infliot upon the plaintiff, Phillip Brenner, a personal injury, for which he instituted suit against the Lincoln Dairy Company, a corporation, and obtained service on said de facto corporation by serving Maxwell Riffkind, its president, and such de facto corporation, by its acting officers, Maxwell, Irving and William Riffkind, caused the appearance of Lincoln Dairy Company, a corporation, to be entered in Circuit Court Case No. 350-17672 entitled Brenner v. Lincoln Dairy Company, and as a corporation the defendant filed an answer denying liability and thereby estopped said de facto corporation, and the members from denying that the defendant Lincoln Dairy Company, was at the time of the injury and at the time of the suit a corporation. A jury was called in the action and returned a verdict for \$3,500 in favor of

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the plaintiff, which was entered on February 26, 1937.

On March 9, 1937, within 11 days after the entry of plaintiff's judgment, Maxwell Riffkind, Irving Riffkind and William Riffkind applied to the Secretary of State for a charter for the defendant Lincoln Milk Company. The defendants, William A. Romanek, Sol Matleen and Joseph Marshall, on behalf of the Riffkinds, became incorporators and agents for the Riffkinds, and pretended to pay for the capital stock; that the Lincoln Milk Company was a mere corporate shell or legal fiction used for transferring the property beyond the reach of execution; that the charter that was issued to the Lincoln Milk Company was not filed of record until May 11, 1937, more than 30 days after the receipt of the charter.

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To defeat plaintiff's execution and place the property beyond the reach of creditors, and without consideration, the Riffkinds on May 12, 1937, executed a chattel mortgage to Rose Mendelson on the same dairy equipment mentioned in the previous mortgage to the First United Finance Corporation. The Rose Mendelson mortgage was to secure a bogus indebtedness of \$1,500.

The property and assets of the Lincoln Dairy Company should be impressed with the constructive trust and subjected to plaintiff's judgment, with interest and costs; that the judgment remains unsatisfied, and an execution has been returned no property found, and there is now due the plaintiff \$3,500 with interest at 5% from February 26, 1937, and reasonable allowance for attorney's fees.

There is a prayer for relief, and that the defendants be enjoined from transferring or encumbering any of their property or assets; am that the property of the defendants, and each of them, be subjected to a lien and execution to satisfy the plaintiff's judgment and costs.

The matter came up before the court on motion of the defendants to dismiss the amended complaint on the ground that the complaint wholly fails to set up any cause of action.

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The question involved in this appeal is whether the court erred in striking plaintiff's amended complaint and in dismissing the cause on the ground that it did not allege facts that would justify the trial court in trying the issues.

By the motion to strike, the defendants admit the allegations that are well pleaded, and if from the allegations of fact and all favorable inference to be drawn therefrom the complaint fails to state a cause of action, the court would be justified in striking the amended complaint and, in a proper case, in dismissing the cause. However, in this case we are of the opinion that there are sufficient facts pleaded in the amended complaint to justify the court in overruling the motion of the defendant Dsiry Company, and that this judgment was based upon the ground of damages sustained by the plaintiff because of negligence of the defendants in the operation of an automobile. From the record in that case it appears that the defendant Lincoln Dairy Company filed its appearance and pleadings and proceeded to trial upon the issues that were made upon the pleadings. The Lincoln Dairy Company, a corporation, as is stated in the pleadings, was in the dairy business, and continued to operate for a considerable time after the charter of this defendant was dissolved by the court for failure to pay the franchise tax, and the individual defendants named in the proceeding had possession of all the assets of this corporation and used these assets in the payment of stock in a new corporation, and also retained such as were not used by these individuals for the purpose of defeating the plaintiff in the collection of the judgment by an execution issued at that time.

It is further stated in the amended complaint that Max Riffkind, Irving Riffkind and William Riffkind, together with Raymond Riffkind, following the dissolution decree of July 18, 1935, continued to operate the same business in the name of the defendant Lincoln Dairy Company, as a corporation, from the same office and with the same equipment, and prior to the dissolution decree, these defendants

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attempted to place the property beyond the reach of the creditors by mortgaging it for the amount mentioned in the two separate chattel mortgages, which the plaintiff alleges was but a pretended indebtedness and did not exist, and that the note which was given to evidence the amount of this mortgage was without consideration.

The sole question before the court is what has become of this property of the corporation. From the statement there seems to have been considerable property which was used by the Lincoln Dairy Company in the conduct of its business. The defendants answer, however, by stating facts that are not in the record. Many of the facts which would have had a proper place if submitted on the trial of the issues after the defendants had answered the amended complaint, will not be considered by us on this motion, for the reason, as we have stated, the amended bill of complaint is the only statement of facts we can consider, as we are controlled by the rules governing the motion to strike the amended bill of complaint.

It is necessary to call attention to only a few of these facts, as stated, to indicate that the defendants have attempted to offer a defense. They mention the condition under which this case was filed and the attorneys who were engaged in the trial of the matter, and that at the time due to pressing business conditions and some trouble occasioned by failure to comply with the ordinances of the Health Department, the premises were shut down and thereupon, Maxwell Riffkind, Faymond Riffkind and Irving Riffkind consulted with an attorney relative to incorporating a new corporation. But what that has to do in determining whether or not there were sufficient facts alleged in the amended complaint, we are at a loss to say. Then the defendants recite the organization of the Lincoln Milk Company, and that it did not receive any of the assets of the old company, etc.

We believe from what appears in the record that it will be well to have a trial of the cause and that there are sufficient

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facts in the record to justify a trial upon the defendants filing an answer.

The court's order striking the amended bill of complaint is reversed and the cause is remanded with directions that the defendants file an answer, and in due course that the court hear the matter on its merits.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. CONCURS, BURKE, J. TAKES NO PART,

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COLLATERAL FINANCE CO., Not Inc.,

(Plaintiff) Appeliant,

SAN BERNAN and SADIN BERNAN.

(Defendants) Appeldees.

APPEAL PROM

MUNICIPAL COURT

OF CHICAGO.

300 I.A. 606

HR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago vacating and opening a judgment by confession, and upon a hearing rendering judgment in favor of the defendants.

Not Inc., obtained a judgment by confession in the Municipal Court of Chicago on 26 judgment notes executed by the defendants, Sam Berman and Sadie Berman, for the sum of \$7,747.00 and costs. Execution was returned mulla bona and garnishment proceedings were commenced against Echhart Park Furniture Company as garnishee, and on February 9, 1937, the garnishee filed an answer "no funds". The defendants answer was contested by the plaintiff and on April 2, 1937, after a hearing, the court entered an order that the garnishee is indebted to the defendant, Sam Berman in the sum of \$59.40, and entered a judgment against the garnishee for said sum. Subsequently the judgment against the garnishee was satisfied.

Thereafter on April 14, 1937, an alias writ of execution was issued against the defendants on said judgment for \$7,747.00 and costs. This alias execution was duly served on the defendant Sadie Berman on April 15, 1937. On April 24, 1937, a petition for citation to discover assets was filed against the defendants, and on the same date citation summons were issued and placed in the hands of the bailiff of the Municipal Court, who served said citation summons on the defendants in this action.

Jordann Alakula Jordan Josephant, (Flaintiff) (Floiling)

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This is an account from an order of the mained in last of the decision of the same rains, an error of hearing rendering judgment in from of the isterment.

On Jennery 11, 1877, the pleintif, tolic 1 fluence 20., Not Inc., coteined or justiment justiment by confession in the indicator court of Unicemo on 16 justiment cotes executed by the defendants, in the sum of 7,747,7c and course. Exemple and dedic defends, for the sum of 7,747,7c and course. Exemple mass returned mility one. And power than the commenced execution of settiment achieves and confession for the defendants! The defendants! The defendants! The defendants! The defendants! The confession by the court into the course of the court of the

Thereofter on april 14, 1477, an exise with of execution and issued equinat the definants on a id judgment of 17,747,00 and costs. into alles execution was fully served on the offen, at the first to, 1837. On april 4, 1937, a mittion for citation to discover easets was filed which the defendants, and on the same into the outliff of the unicipal jours, and served and taked in the land of the pailiff of the unicipal jours, and served and taked in the summens on the later in this action.

The defendants failed to appear on May 6, 1937, in response to said citation summons, and a rule to show cause was issued against them, returnable May 17, 1937. On May 11, 1937, each of the defendants was personally served with a certified transcript of the rule to show cause, and each of them was examined in open court and an order was entered discharging the rule to show cause and dismissing the citation against them.

Then, on January 12, 1938, another garnishment action was instituted against Eckhart Park Furniture Company on said judgment. Subsequently, this garnishee filed a sworn answer alleging no funds and stating "inter alia" "that Sam Berman has been and is now a married man, the head of a family and resides with same in the City and of Chicago, is therefore entitled to exemption of \$20.00 per week under the laws of the State of Illinois." Reanwhile a creditors bill predicated on said judgment had been filed in the Superior Court of Cook County and proceedings had therein.

vacate and set aside said judgment of January 11, 1937, upon the sole ground "that the Collateral Finance Co., Not Inc., not being a legal entity, said judgment is void for lack of jurisdiction." To this motion the plaintiff filed an answer alleging, among other facts, that a creditors' bill was filed in the Superior Court of Cook County based upon the judgment; that both defendants had filed their pleas; that the defendants made a motion before the court, to whom the creditors' bill was assigned, to have the creditors' bill dismissed on the ground that the judgment upon which it was predicated was not a legal entity, which was the same ground on which this motion was denied by the court. This case was transferred in the Municipal Court by reassignment to Judgs McGarry. The defendants, by leave of court, filed a petition to vacate and set aside the judgment of

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Then, on Jernary I., 1888, androse arms of the color of the color obsequently, this can be readed and senting and states and the color of the colors of the color of the colors.

Vaccete and set iside to d' judement of coursy to, i. "T, wenn the wold ground "that the collaboral sinance on, hot Inc., i." bein a less contity, said judy cont is void for less if judicification." To this motion the disintify filed to answer the interior of the county to the disintify filed to answer the interior of the county to the disintify filed to answer the object of the county based of or the judy sent; that a critical county to county the tane defendents and a motion of the count, to the file for the following the file of the count, to the front the file judy ent upon units it as restricted on the ground that the judy ent upon units it as restricted and a legal entity, which we take upon units it as restricted on the ground that the following the counts in the counts of the court, the counts of the orders and the firm one court.

January 11, 1937. In an amended petition it is stated by the defendants that the judgment was void because the plaintiff, Collateral Finance Co., Not Inc., was not a legal entity. This petition further up as a further defense an alleged oral agreement between Ben Kavin, a former owner of the notes herein, and Margaret Simon, to cancel said notes, and that the plaintiff acquired the notes with the knowledge of this agreement, and therefore the defendants are not liable to the plaintiff on the notes.

On March 25, 1938, the court entered an order opening the judgment, allowing the amended petition to stand as an affidavit of merits, and setting the case for trial. The court also entered an order granting leave to the plaintiff to amend its complaint to read, "M. Hatowski and D. Hattis DBA. Collateral Finance Co., Not Inc., a co-partnership". After several continuances the cause Came up for trial upon the pleadings as amended by both parties, and after a trial upon the issues thus presented, the Municipal Court entered its finding against the plaintiff and in favor of the defendants, and ordered the judgment by confession vacated and set aside, and that the plaintiff take nothing by the suit.

The plaintiff was given leave by the court to amend the name of the plaintiff in the above entitled cause to read M.

Hatowski and O. Hattis DBA Collateral Finance Co., Not Inc., a copartnership, and the defendants were granted leave to file and did file on March 25, 1938, an amended petition to vacate and set aside the judgment by confession emered on January 11, 1937. Upon the filing of the motion the court entered an order that the judgment be opened; that leave be and is given to the defendants to appear and make defense herein, and that a trial of this cause be had notwithstanding the judgment, and that the judgment stand as security until the further order of the court.

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Jennary II, 1937. In a casedou refahren is a second of the defendants that the case the case of the second of the case of the

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Defendants amended petition to vacate and set aside the judgment by confession is in part as follows: That one, Myer J. Hatowski and one, D. Hattis, now claim or pretend to be co-partners, doing business as Collateral Finance Co., Not Inc., and now claim or pretend to be the legal owners or holders of said notes; that these defendants charge that Myer J. Hatowski and D. Hattis acquired the promissory notes after their maturity with full knowledge of the agreement aforesaid, as described in Paragraph 4. In paragraph 4 the defendants charge that on, to-withthe 16th day of May, A. D. 1936, an oral agreement was entered into by and between one, Ben Kavin, the then owner of the promissory notes, and Margaret Simon, whereby Margaret Simon agreed to and did pay to Ben Kavin \$500 cash, and in consideration therefor Ben Kavin promised and agreed to procure a release of the junior mortgage and to cancel all of the promissory notes then unpaid and to release the defendants from any and all liability thereon, and to surrender said cancelled notes to these defendants; that said agreement further provided that one, Fred Prochep, the then owner of the premises aforesaid, was to execute a quit-claim deed releasing all his right, title and interest in and to said premises to the said Margaret Simon in consideration of the payment to him by the said Margaret Simon, or her agents, of the sum of \$350; that pursuant to said agreement, Fred Prochep duly executed said quit-claim deed and received the aforesaid sum therefor: that the said Ben Kavin, pursuant to said agreement, did procure from the said Phillip L. Freed, trustee, a release of said junior mortgage; that he, Ben Kavin, fraudulently failed to cancel said promissory notes then outstanding and unpaid and to release the defendants herein from liability thereon and to surrender the notes to the defendants herein; that instead of cancelling the same and releasing the defendants from liability and surrendering said notes to them, as

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It is to be noted that in this proceeding the plaintiff did not offer any objection as to the filing by the defendants of the amended petition to vacate the judgment, or offer any objection to any of the proceeding had by the court upon the hearing of the issues based upon the pleadings, or even objected to the entry of the judgment.

From a further consideration of the record it appears that the plaintiff not only took an active part in the conduct of the trial, but even obtained leave to amend the name of the plaintiff, as we have outlined in this opinion. In Lox, et al. v. Bradley, 179 Ill. App. 1, this court held that the plaintiffs waived the jurisdictional question by going to trial without objection, and said:

"Whether the order opening the judgment and giving the defendants leave to make a defense and have a trial of the cause was, or was not, proper on the petition, it is not necessary to decide. After the judgment was opened the plaintiffs appeared, took part in the trial and moved for a new trial. They thereby waived their right to except to the order. After the cause was so opened, the plaintiffs should not have appeared at all, or at most, should have confined themselves to the resistance of any action proposed by the defendant. Grand Pacific Hotel Co.

v. Finkerton, 317 Ill. 61. Herrington v. McCollum. 73 Ill. 476; Wilson v. Chandler, 133 Ill. App. 633.

The objection to the jurisdiction, it was said in Schafer

v. Moe, 72 Ill. App. 50, 'must be persisted in and solely relied on, in order to be available.'"

As we have indicated, it was upon the pleadings as amended by both sides that the trial of the cause proceeded, and evidence and arguments were heard without objection by either side. In <u>National Lead Co.</u> v. <u>Mortell</u>, 261 Ill. App. 332, wherein the jurisdiction of the trial court to vacate a default judgment was in issue, the Appellate Court said:

"Moreover, the plaintiff maived the question by participating in the trial. The pleadings were settled under an order of court approved by all the parties to the proceeding."

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It appears from the final order entered by the court that evidence was heard upon the issues presented and the court entered the final order as outlined by this court in its opinion, so that in view of the fact that the evidence is not preserved and is not a part of the record, we may assume that there was sufficient evidence to justify the court in entering the order in this case.

The plaintiff made the further suggestion that the defendants were not parties to the oral agreement set forth in the amended petition. The defendants answer to this is that the agreement set forth that Ben Kavin fraudulently failed to carry out his promise, and instead, negotiated the notes in question, and that the plaintiffs. Hatowski and Hattis, knew of this agreement when they acquired the notes without consideration and after maturity, and in view of the fact that the plaintiff did not object to the sufficiency of the defense upon the trial, it must therefore be held to have waived its right to object at this time. Upon the question of objection to the sufficiency of the amended petition, Rule 104 of the Revised Civil Practice Rules of the Municipal Court of Chicago, in force November, 1935, provides in part as follows:

"No new trial shall be granted or any judgment vacated or set aside after a trial and a finding by the court, or a verdict of a jury, on the ground of any insufficiency in law of any pleading unless the same discloses no reasonable cause of action or defense and it is apparent that no legitimate amendment can make it good and it further appears that prior to the trial such insufficiency in law was brought before the court for its consideration by motion as hereinbefore provided. * * **

Note 1, appended to said Rule, provides in part as follows:

"If parties see fit to go to trial with defective pleadings, which could be made good by amendments if the defects were pointed out, they should be bound by the result of the trial unless the evidence is preserved by a report of the proceedings and is not sufficient to support the judgment."

And again, Sec. 42, Par. (3), Oh. 110,/St. Bar State. provides:

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And spring loo, 40, fir, (3), Ch. 11/1/ t. or sets, recise;

"All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived."

And in passing upon a like question this court in Gafson-Payson Co.

v. Peoria Terrazzo Co, 288 Ill. App. 583, said:

"Conceding that the complaint in the instant case was defective in that there was no allegation to the effect that appellant was free from contributory negligence, that defect was not objected to in the trial court and under the provisions of section 42 of the Civil Practice Act, which provides that all defects in pleadings, formal or substantial, not objected to in the trial court are waived, the sufficiency of this complaint cannot, for the first time, be challenged in this court."

So, the plaintiff having failed to raise the question of sufficiency of the amended petition filed by the defendant, it is now barred to question the pleadings as it attempts to do in its brief.

For the reasons stated, the judgment is affirmed,

JUDGMENT AFFIRMED.

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DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

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SARAH F. PETERSON and CHARLES A. PETERSON,

(Plaintiffs) Appellees,

SUPERIOR COURT

PPEAL FROM

ANDREW CLARK, doing business as A. CLARK TRANSPORT COMPANY,

(Defendant) Appellant.

COOK COUNTY.

MR. JUSTICE HEBEL DELIVERED THE OPINIOR OF THE COURT.

This is an appeal by the defendant, Andrew Clark, doing business as A. Clark Transport Company, from a judgment entered by the court for the plaintiff, Sarah F. Peterson, and against the defendant for \$5,000. The suit was for personal injuries sustained by the plaintiff in an automobile collision which occurred January 20, 1937, at the intersection of Route U. S. 30, the Lincoln Highway, and Route U. S. 45. The location of this intersection was near the town of Frankfort, Illinois, and about 20 miles from Joliet, Illinois. The jury found the defendant not guilty as to the co-plaintiff, Charles A. Peterson.

that on the 20th of January, 1937, the defendant was in possession and control of an automobile truck with a trailer attached, that the defendant by its agent and servant was operating said automobile truck and trailer in an easterly direction along and upon Route U. S. 30, commonly known as the Lincoln Highway; that Charles A. Peterson was operating an automobile in a southerly direction along Route U. S. 45 and at the intersection of Route 30, the Lincoln Highway, that the plaintiff, Sarah F. Peterson, was riding in the automobile with him; that both plaintiffs, Charles A. Peterson and Sarah F. Peterson, were in the exercise of ordinary care for their own safety; that the defendant through his agent and servant carelessly and negligently

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operated and propelled an automobile truck and trailer so that by and through the negligence of the defendant the collision occurred between the truck and trailer and the automobile in which the plaintiff was riding whereby the plaintiff sustained the injuries complained of in the third count.

The second count contained a charge that the defendant by
his servant and agent then and there so wilfully and mantonly propelled
and operated the truck and trailer that by and through the wilful
and manton conduct of the defendant the collision occurred and the
plaintiff sustained the injuries complained of in the third count.

The third count charged as negligence on the part of the defendant violation by the defendant of a statute of the State of Illinois providing that during the period from sunset to sunrise every motorist shall carry two lighted lamps showing white lights or lights of a yellow or amber tint visible at least 500 feet in the direction in which the motor vehicle is proceeding and also one lighted lamp which shall be so situated as to throw a red light visible for at least 500 feet in the reverse direction; that the defendant was in violation of this statute, and that the plaintiff, Sarah F. Peterson, was injured in a collision between the two automobiles as a result of which she sustained injuries.

The defendant, Andrew Clark, answered admitting the ownership and control of the automobile truck and trailer in question, denied that the plaintiffs were in the exercise of due care and caution and denied that the defendant was guilty of any of the acts of negligence and wilful misconduct charged against him.

Further the defendant answering alleged that the plaintiffs, Sarah F. Peterson and Charles A. Peterson, at the time and place in question were guilty of wilful and wanton conduct, and that such conduct on their part contributed as a proximate cause of the accident and injury without which the same would not have occurred. It is further

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alleged that by reason of the plaintiffs' wilful, wanton and reckless conduct they thereby contributed as a proximate cause of the accident and injury without which the same would not have occurred.

Prior to the trial, plaintiff's counsel filed of record an affidavit wherein plaintiffs' counsel stated that he was informed that Andrew Clark, the defendant, was insured against liability for injuries by the Associated Indemnity Corporation, which was a company engaged in the business of writing automobile liability insurance; that the company had an office located at 166 %. Van Buren Street, Chicago, Illinois; that that corporation was a stock company paying dividends to stockholders and policyholders; that the insurance company had made an investigation into this cause of action and employed the firm of Robertson, Crowe and Spence, attorneys of record, to defend the case; and that the insurance company is interested in the result of the suit and liable to pay part or all of any judgments, if any.

engaged in the business of transporting automobiles from Detroit, Michigan, and on the day of the accident, January 30, 1937, one of his trucks with a trailer attached was being operated by his employee Charles F. Beebe. Beebe had been to Cedar Rapids, Iowa delivering a load and was returning with the empty truck and trailer to Detroit. Beebe had had spark trouble, the truck had a governor on it which it is claimed made it impossible to drive it at a speed in excess of 40 miles an hour; Beebe got onto the Lincoln Highway, U. S. 30 and was eastbound. The Lincoln Highway at this point is a four-lane concrete through highway. On other highways intersecting the Lincoln Highway there were signs erected requiring motorists coming up to and before crossing the Lincoln Highway to come to a stop. There were such signs on both sides of the Lincoln Highway on Route 45 at the intersection where the accident occurred. The accident happened about 4:000°clock

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in the afternoon. It had been raining and at the time of the accident it was misty and cloudy. Beebe was proceeding east on the right-hand or south lane of Route 30 and proceeding up to the intersection of Route 45.

The plaintiffs, Charles A. Feterson and Sarah F. Peterson, his wife, lived in Battle Creek, Michigan and were on their way to California. They left at 6:00 o'clock in the morning of the day of the accident, Mr. Peterson driving a Studebaker two-door automobile. It had rained most of the day. Through error the Petersons went to Kankakee, Illinois, lost their way had turned back and before the occurrence of the accident were southbound on U. S. 45, coming up to the intersection of Route 30, the Lincoln Highway. The car in which the Petersons were riding and the truck and trailer outfit of the defendant both crossed into the intersection where they collided, as a result of which the plaintiff, Sarah F. Peterson, sustained injuries.

The defendant contends in regard to the accident that the plaintiff, Sarah F. Peterson, failed to prove that before and at the time of the accident in question she was in the exercise of due care and caution for her own safety, and that the trial court should have directed a verdict for the defendant.

The defendant points to the evidence offered by the plaintiff, which consisted of three disinterested witnesses, in addition to which the plaintiff and her husband also testified. Both the plaintiff and her husband at the time of the accident were 69 years of age. On the day of the accident they started from their home in Battle Creek, Michigan, for an automobile trip to California. Mr. Peterson was driving in the left front seat, and his wife, the plaintiff, was sitting beside him. On the back seat and on the floor was their baggage. They were traveling south in the country on a concrete

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The defendant points to the evilance offered by the piaintiff, which consisted of three dislaterested situesses, in addition to which the plaintiff and her husband also tentified. Noth the alain-tiff and her husband at the time of the socident were 65 years of ego. On the day of the socident they attited from their home in dattle Greek, Wichigen, for an automobile trip to California. Mr. Reterson was driving in the left front seat, and his wife, the alaintiff, was sitting beside him. On the b of such and on the floor was their saggage. They were traveling south in the country on a concrete

highway known as Route 45 and at the time of the occurrence of the accident were crossing a four-lane through route highway No. 30 and known as the Lincoln Highway.

A witness for the plaintiffs named John Kahn, testified that he was not acquainted with any of the parties in the case, that with his son-in-law, Eugene Boucher, he had been in Chicago and was returning to his home in Peotone, Illinois; that the weather that afternoon was foggy and rainy; that at times one could see 100 feet. then 200 feet; that the pavements were wet and that he had the lights on his automobile. Kahn first saw the plaintiffs' Studebaker automobile on Route 45; that it was going about 20 miles an hour and that he caught up to it and passed it. At the northwest corner of Route 30 and 45 was Larson's oil station. The building itself was 100 feet west of Route 45. The gasoline pumps in front of the building were 12 to 15 feet from the north side of the pavement of Route 30, the Lincoln Highway. Kahn noticed that the back of the plaintiffs. automobile was packed with boxes, clothing, etc. Kahn stopped ten or fifteen feet from the north line of Route 30; that the Petersons drove up behind him and stopped. Kahn turned off to the right into Larson's gas station to get gasoline. At that time a transfer truck was coming from the west on Route 30, the Lincoln Highway; that he first noticed it when it was 100 to 300 feet away; that it was a wet, foggy and slippery day and that the truck was going much faster than he drove. Kahn testified that perhaps he was not a fair judge of the speed of automobiles but he thought it was going between 50 and 60 miles an hour. He saw it going by and heard a crash and then looked up. He did not see the actual crash. After the crash Kahn saw the transfer truck stop at the southeast corner of the pavement, saw the plaintiffs! Studebaker car go on to the southeast and against the gasoline station on the southeast corner. Kahn testified that

highest known as woure of and at the time of the course and of the ascident were crossing a four-lase torough which age.

A witness for the lathtiffs a co San cha, certified that he were not sequelated with any of the pertient of the state saw for openion or seed bot so tollow assaut .wel-mi-man sid returning to and home in cotons, illiaming in t the . there that afterboom was fogny and rainy; that at times one could see 100 feet, then 901 feet; that the powerents yers wet and that he had the Liphes on his sucompile. Son lives see and interest states of find Tuge as wells " find: galay se. Il first job sive so bilden that be saught up to it that and arest it, it has ourtearst corner of Route 50 and 45 are Larson's oil at tion. The hydiding itself was 100 feet west to though a second entitles, edit of the outline ing were ld to in 18 fet from the worth sife of the coverent of the S the blaceba dightry, K as betieve is the 's ex of the highesterist automobile was proked with carre, ciching, etc. Kenn stepred ten or fifteen feet that the nexth line of the the the terreons drave up behind him and storped. Luhn turned off to un right into larson's gas station to ast gaseline. It that time e transfer truck wes coming from the west on noute 39, the Lincoln in very; that be first noticed it was it was 10 to 200 feet or y; that it was a wet, resort down anion are sent that and has you grouple has yoget equal til te don and on at dron toot tract that . sport ad mads of the apped of nulcoopina me the the sell was going between 50 and 60 miles on bour. He see it coins by he seems on coils then nded de ere out reste . deren leuten see tot bet en en la lectus de eres de lectus de eres de le er sam the transfer truck stop at the mouthwest corner of the corner, see the plaintiffs Studebiter of se on to "he southeast and against the asoline station on the mouthe at morner. Kahn testified that

the windshiled wiper on his car was working; that 10 or 15 feet north of the Lincoln Highway there was a stop sign.

Rugene Boucher was also called as a witness. He testified that he was riding with his father-in-law, John Kahn; that he did not see the Peterson automobile before the accident; that he and his father-in-law had turned into Larson's garage; that he was getting out of the car facing in an easterly direction when he heard a crash and then ran over to the scene of the accident.

Another witness produced by the plaintiff, walden R. Larson, testified that he ran a garage at the northwest corner of Route 30 and 45; that on the day of the accident at about 4:30 P. M. he was in the garage and heard a crash. He looked out of the window and saw the defendant's transport truck go by. It was then about 20 feet west of the garage. He stated that in his opinion it was going about 50 miles an hour. He did not see the collision.

Charles A. Peterson, one of the plaintiffs and driver of the car in which Sarah F. Peterson, his wife, was riding, testified that he was driving a two-door Studebaker car; that they left Battle Creek, Michigan in the morning, arrived in Kankakee some time after noon, found they had lost their direction and were retracing their route; that it was gloomy and had rained most of the day; that they were driving south on Route 45 having already traveled about 300 miles; that Mrs. Peterson was sitting with him in the front seat and that as they came up to Route 30, the Lincoln Highway and about 330 feet from Route 30 there was a large sign at the right side of the road on which was printed "Caution"; that he slowed down; that there was a car ahead of him about 20 or 25 feet; that it was very murky, at times one could see quite a distance and then not very far. His opinion was that he could see 100 feet; that when it cleared up he could see about 100 or 150 feet; that he had the bright lights on; that after he passed the caution sign and about 50 feet from the north edge of

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Ars. Sarah F. Peterson also testified to the effect that they left Battle Creek, Michigan at about 6:00 o'clock in the morning, and that previous to the time of the accident they were going south on Route 45, and that they saw a caution sign. "Q. Did you do anything or say anything when you saw this caution sign? A. Yes. I

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to : in the second of the commence of the contract of the cont effects of the mean sent of the section of the sect Luring a sasting that we have invited to the to the tour and come to a tor. It, it is not read to find the file be amount by that the kingo was taken by the ten bil for animos to be being the four four also also be also as also as a compact of the compact o - intraca stores frottocata groo rat on pur about day to between been the states and to the arrivates of the states of the contribution of the states of the and let the window down at how imposition rests on the one of you through without try ocatrotion; itself ". " ": room, within regards and the J. D. who. I have profess to a dweet moderate end dilw erend without any obstruction; that ward he ase a to a lacolin a correspond and etempted he down and got are the color of the color ිම් අයත් අත්වාදය යන අත් අත්වාලයේ මුදාවේ ශ්රී කරනවරේ මන්වී **සිට අවම** මන්ව looked to the sage and then to have the last and above slong the wrs. Paterner being laws in inches to a faut from top be hed a and finds ray coom ser tagineye his sist inter the herestoods but train looked west 10 - a 150 feet; thet in reit we sure in from the blood on wis. . st recent a make try one try and the contract of the the transfer is to be a secretarist be a secretarist to be secretaristically and the secretaristic and secretaristic tures in the for no master through the area to contract of or partage of then he are the trop textended wid no trained hope had ad tent across the Lincoln diphery he can point from a to a clime an hour and of the appeal an could ston within a face on the tel not ont his brikes on at toy time older or see

 called to him - I reminded Charley of the caution sign". At that time Mrs. Peterson did not see any other cars behind or shead of them. As they came up to Route 30 she saw the stop sign on the right-hand side of the road; they came to a stop behind it; they had the lights burning on their automobile. It was raining, dark and murky, and the window at her right had not been up all the time; that the window was open; that they came to a stop behind another automobile and stopped about five feet before entering Route 30; that they did not see any traffic on the road at the time.

Evidence offered by the defendant upon the questions involved in this case is the testimony of a witness named Harold D. Dennis. who testified that he was at the gas station at the place in question and witnessed the accident which occurred about 3:30 or 4:00 o'clock in the afternoon; that he had been at the service station and started south on Houte 45; that he came up to the Lincoln Highway and stopped at the right-hand side; that at that time there were no other cars beside him or in front of him; that he saw the defendant's truck coming from the west, and when he first saw the truck it was 500 or 600 feet to the west of him, and that Dennis did not have any lights on his automobile, nor were there any lights on the truck: that he noticed the truck coming from the west at about 40 or 45 miles an hour; he sat there and waited for it to go by; that as he sat there a car came up from behind him at the side and passed him, which was the Peterson car. He testified further that it passed into the Lincoln Highway without stopping and struck the front part of the truck at the cab on the left-hand side. To the same effect is the testimony of E. J. Heisler, who was operating the filling station at the southeast corner of Route 30 and 45. He was a witness to the accident; sat at the window in his garage, and first saw the defendant's truck coming east at a distance of 200 feet west of Route 45. At that point there was a hill or incline and the truck

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torieval and the defendant and the best to be attenuable in this case is the tratimony of a groces name !! "oil !. sunis, noiseem, a. noni this se neighbour at an east as new ed dodd beilliest ods Members for an Car town corresponded suctions out becomes has in the afternoon; that be h of them as the astronaction and started south on contr 45; the he case at the the cincoln against on seek orthis emis sould so ters; their band-saget and to bacquie bas ether care beethe win or in front of sin; that he are the defendable truck coming from the west, and then he tiret es the truck it was 500 or 600 feet to the seat of him, and that Courie lid not have ony lights on his submodule, nor were there may limits on the truck; that he most cod the truck contact from the erat at control at or 45 miles an hour; he ast there of weited for it to mo by; the as he sat there a cer come un from behind his et the site and overed him. teaser if and recited billiant of . the sugretal of see doids into the Lincoln Pichesy without weapons one street has room and of the truck at the con un to left-bent sile. To the sum enfect is the testimony of . . Heisler, she was consting the filling station at the couties to tear of loute 30 and 45. At was a sixness to the accident; ort at the window in his yers, e, out first sa the defendant a truck coming e at a distunce of 100 feet egs of Route 45. At the point there was a hill or incline and the track

was coming down the hill traveling at a speed of about 40 miles an hour. He saw a car standing, being that of Harold D. Dennis, at the intersection; that at the same time the truck was coming towards the intersection the plaintiffs car passed it on the left-hand side without stopping, and came into the intersection. The southbound Peterson car struck the eastbound truck between the cab and the door; that Peterson's car came through the stop sign without stopping and was moving at a speed of from 25 to 30 miles an hour.

Charles F. Beebe, the defendant's truck operator, testified that he delivered a load to Cedar Rapids, Iowa, and was returning to Detroit; that the truck had a governor on it by which the speed was governed, so that it was impossible to drive more than 40 miles an hour; that he did not have the lights burning on the truck; that he proceeded east over on the right-hand side of the road, and when he was 300 feet from Route 45 he looked towards his left and saw no southbound traffic: that before he got to the intersection he looked again both ways and saw the plaintiff's automobile 15 feet to his left and making a noise and going very fast. This witness did not notice whether it had burning lights on it or not, but Peterson's car came into the side of the cab where Beebe was driving. The collision took place in the fourth or right lane of both intersections. After the collision Beebe stopped his truck at a distance of 20 feet. the force of the collision Beebe was thrown out of the truck to the ground, and the truck sustained a broken spring, and was damaged otherwise. He testified that Peterson's car went 65 or 70 feet before stopping and collided into the side of Heisler's gas station.

So from the facts as we have detailed them in this opinion the questions were controverted ones. This is clear from the evidence as to the speed at which the plaintiffs' as well as the defendant's car was traveling, and the testimony of the witnesses introduced by the defendant to establish the facts regarding distances. All of these

was coming down the bill traveling as a count toot 40 diles an hour. He saw a car exading, bring that of H rost a. Bendie, at the intersection; that at the aute the track was acting towards the intersection the plaintiffs' car would it on an ieft-acting side without atopping, and came into the interpetion. The southbound Petersen car struck the earthound that between the rational the satisfication that another and the door; that Fetersen's aur once through the pion size wathout stopping and was moving at a speed of from the 50 miles an over.

Charles S. Bache, the defendant's track cocount, tratified that he delivered a land to dear "raide, lose, or es returning beace and defect the truck as a sovereer at it by valet the selle Co nest eros aviti to aldiaence and it tell as harrance see an hour; that he did not have the lighte borning on the truck; that ned proceeded exet over on the right-hand side of the road, and when on was bue die ald abrevot beloof as do stook mort jest 000 eaw ad aouthbound traffio; shot before be not to the intersection he looked That sid of took of milderotum affiliate to the see the star died nish and muking a noise and going very fast. This witness did not notice enco was a answered tud , ton to the so establi galaxed bed it redicate into the side of the oab where beebe was driving. The collision took place in the fourth or right lene of both intersections. collision Beebe stopped his truck of a distant of 30 feet. the force of the cellision seeds was thrown out of the trues to the ground, and the truck contained a broken sorticu, and was famored otherwise. He testified that reterann's our cent do or 70 feet before stopping and collided into the side of Heirier's and station,

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facts were controverted and were for the jury to decide, both from the evidence of the plaintiffs to establish facts as alleged in their complaint, and the evidence offered by the defendant.

The defendant contends that the court erred in permitting plaintiffs counsel to interrogate the jurors on their voir dire examination by questions which directly or indirectly implied that an accident insurance company was interested in the defense of the case, and points to the fact that on the day of the trial plaintiffs. counsel tendered to the court and filed of record an affidavit. In the verified affidavit plaintiffs' counsel states he was informed that the defendant, Andrew Clark, was insured against liability for injuries by the Associated Indemnity Corporation: that that corporation was an insurance company and engaged in the business of writing automobile liability insurance, having a mid-west department at 166 West Van Buren Street, Chicago; that it was stock company paying dividends; that that company made an investigation and employed attorneys of record to defend the case; that the insurance company is interested in the result of the suit and liable to pay any judgment. The plaintiffs asked and obtained leave to question the jurors as follows:

- "1. Have you any financial interest, either as stockholders, policy holders, or otherwise, in the Associated Indemnity Corporation?
- 2. Have any of you any friends or relatives who are employed by that concern in any capacity?"

There was no response to either question.

In passing upon a like question the Supreme Court in <u>Smithers</u>
v. <u>Henriquez</u>, 368 Ill. 588, said:

"While the filing of an affidavit and a preliminary determination of the right to question the jurors as to their qualifications in any respect is unnecessary, it is a commendable practice where it is claimed the subject matter is prejudicial. It protects the opposing litigant from the subject being impressed upon the jury by an altercation or discussion in their presence, and tends to

facts were controverted and save for the jury to strict, the from the evidence of the circletation to extending the evidence or early by the department.

The defendant continue that for court erred in moraliting winitiffs' counsel to interregate the jurges on their voir litte fine botton to there is no glaserib dulds another to notherizate the off in the transfer owners of the terminal and the transfer of the osse, and points to the first on the fay of the tries of the counsel tendered to the agent and filed of record on willd wit. In the verified of identity plaints for need atake be a s informed that the de entent, andre. Here, as it were a cincility for injuries by the Associated Indesaty war or tion: that torrowers tion was an incurrence castleny and entered in the overless of ritting bbi to the transfer of teachie a chiral activation and the transfer of the best of the transfer of the transfe det en Buren firee, Join et that it e stork ceurens calina dividenda; that the r commany as are an averty tion and employed attorneys of record to deligh the case; that the traprince cowleng la interested in the result of the oult and inche to may any judgment. ar granuf one guideau, of av or inhigher the boxes attitulate say feilews:

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There we a no response to either question.

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v. Henriovez, 348 111, 588, ssid;

TWHILE the filling of an affice vit and a or liminary detaining to of the right to marrison the jurges as to their avolitic fills in any respect is unaccessary, it is a commendate arrection above it is claimed the subject matter is arejulicial. It projects the opposing littleant from the subject being impressed woon the jury by an miteraction or discussion in their aresence. In tends to

show good faith of the proponent. Under his duty as a lawyer and to his client, plaintiff's counsel was required to exercise all lawful means known to him to see that no interested party sat as a juror in the case. * * * *

The proposed inquiry was disclosed to the court and opposing counsel in chambers and fully discussed before any attempt was made to interrogate the jurors. The record does not show the employment of any subterfuge to inform the jury that an insurance company was defending the suit, or any other improper motive or misconduct on the part of plaintiff's counsel. From the record it appears the inquiry was for the purpose of exercising the right of challenge."

From an examination of the record we find nothing which would indicate that the motive was other than to ascertain from the jurors whether they were interested in the outcome of the litigation in any way, and as stated by the Supreme Court: "Under his duty as a lawyer and to his client, plaintiff's counsel was required to exercise all lawful means known to him to see that no interested party sat as a juror in the case". When we come to consider the verdiet that was returned in the instant case, it does not appear that the jurors were influenced by reason of the questions submitted to them upon their examination to act as jurors.

The defendant contends that the plaintiff Sarah F. Peterson was guilty of contributory negligence in that the plaintiff failed to prove that before and at the time of the accident in question she was in the exercise of due care and caution for her own safety, and for that reason the trial court should have directed a verdict for the defendant. When we consider the statement of facts, which we have incorporated in this opinion, this was a question for the jury to determine.

The defendant also contends that the plaintiff, Sarah F.

Peterson, when approaching Lincoln Highway did not indicate to the

co-plaintiff, her husband, that they were approaching an intersection,

and that there was not alone a caution sign in the highway, but also

a stop sign, indicating that they were required to stop at this highway.

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The defendant also contends that the claimfif, Sarch T. Peterson, when appreaching lincoln Highrey did not indicate to the co-plaintiff, her husband, that they were appreaching an intersection, and that there was not alone a crution sign in the highway, but also a stop sign, indicating that they were required to atop at this highway.

The fact is that the plaintiff did indicate to her husband when they came in view of the caution sign, and directed his attention to it; also that her husband, who was in control of the automobile, stopped in the approach to the Lincoln Highway, and there is evidence that Mrs. Peterson looked towards the west, as did Mr. Peterson to the east and west to determine whether cars were approaching, and after ascertaining that no cars were approaching, proceeded to cross Lincoln Highway. There is evidence in the record that the defendant's truck was approaching at a speed of from 50 to 60 miles an hour. This evidence, however, is contradicted by witnesses who were produced by the defendant, both as to the rate of speed of the truck and as to the distance it was from the intersection. witness testified that when he looked it was 500 or 600 feet away. and that the plaintiffs' car proceeded onto the highway and ran into the side of this truck; that at the time the truck was traveling at a speed of from 40 to 45 miles an hour. Now, these are questions of fact for a jury, and it was for the jury to determine whether the plaintiff, Sarah F. Peterson, was in the exercise of due care and caution for her own safety.

The defendant contends that the driver of his truck was not negligent, and that he had the right of way. In considering the question of whether or not the record shows negligent operation of the defendant's truck, it is necessary to turn to the evidence and determine what the proof was as to the movements of the defendant's truck and its operation. As we have previously indicated, it was for the jury to determine from the facts the questions involved in this litigation, and we believe from the facts as they appear in the record the operation of defendant's truck was negligent. It was also for the jury to determine whether defendant's driver was

The fact is the ten claimed his increase by the set off they came in view of the eartist align, on livered align melon graditional and the limit or our of the grown dead wind from only it of stopped in the appropriate to the biscoula carrie, and the appropriate our segment thet dre. seterate lacked terrila to the lit. o .t. o .t. ्राप्त विकास कर का ताल कर का किल्ला के किला कर का किला कर का कर का कर का कर किला कर का कर का कर का कर का कर का of the temperaturing state and early and the second materials and orose timedia dishery, there is evidence in the ecoupt the defendant! a truck rie ni Tordita, it i sucha if frae 50 to u. miles THE RESERVE OF U.S. STREET, ROTTE SE PLINTED OF GOVERNMENT SERVE SERVE - THESE BEACHT. and the first by the star all the end of the first add the the one on the file of the contract of the state of the same source with the contract of the contr and that the planning of aroseres and the rest and that the the side of this truck; that so the time she truck so to welling of a spaced of frem with to the miner on been, but ye or one stions of sair guilled and mot a grot add and as its agreet a col feet plaintiff, aron f. Paterson, and in the exercise of the are saution for her own as frig.

The defendant contends that toward of the river of the send weight and negligent, and then he see that of g. the sends weight the nucleion of the states of the send of the defendant extract, it is necessary to the send as evidence and defendant what the arout and to the source of the example of the send the continue of the example of the fury to determine from the look the cuestives in the the fury to determine from the from the factors of the example of the example

subject to the charge of wilful and wanton misconduct, made by the plaintiffs in the second count of their complaint. But the defendant answers this charge by stating that the plaintiff Sarah F. Peterson and Charles A. Peterson were guilty of wilful and wanton misconduct and that this contributed as a proximate cause of the accident and to the injuries sustained by Mrs. Peterson.

There is evidence in the record that the defendant's driver operated his truck and trailer towards the intersection at a rate of speed of from 50 to 60 miles an hour without giving any warning, without looking out or having the truck under proper control. It also appears from the facts that the drivers complained that neither saw each other before the collision, which would indicate that visibility was poor, but the evidence does disclose that the bright lights were burning on the plaintiff's car, and that the lights on the defendant's car were not burning at the time of the accident. Our attention has been called to the case of Malldren Express Co. v. Krug, 291 Ill. 473, where the court said:

"Whether the negligent conduct of a defemiant which has resulted in injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury."

See also Heneghan v. Goldberg, 396 Ill. App. 253.

While the speed at which the defendant's truck was going at the time of the accident appears in the record, still to determine whether there was wilful and wanton misconduct in the operation of the defendant's truck the jury was required to take into consideration all the facts and circumstances surrounding the collision and determine that question, and we believe from the facts as they appear in the record there was sufficient evidence for the jury to consider whether the operation of the truck by the driver constituted wilful

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There is evirance in the record to at . Bo ... There is direct operated his truck in trailer towards the intersection it a rate of speed of from 50 to 60 miles on hour sithout stain; say making, without looking out or having the trick under stains for the converse operation. It also appears from the rate that the intersection of a convinter in setteer that obtaining and the opinion of the intersection, but the ovidence set isolose that the oright lights were borning in the alsohiff's owr, so that the injuits on the defendant's air sore as involve the injuits on the defendant's air sore as involve the time of the content.

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and wanton misconduct.

We have considered the facts as they appear in the record and we are of the opinion that there is no evidence upon which the jury would be justified in finding that Mrs. Peterson was guilty of wilful and wanton misconduct at the time of the accident.

The plaintiff calls to our attention the definition of a wilful and wanton act contained in the Motor Vehicle Act, Far. 145, Sec. 48. Ch. 95-1/2, Ill. State Bar Stats. 1937, as follows:

"Reckless Driving. Any person who drives any vehicle with a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving."

and plaintiff further states that the expression "wilful and wanton act" or "wilful and wanton conduct" has been very frequently defined by the courts of this state. Many of these definitions include the phrase "of such a reckless character as to exhibit an utter disregard for the safety and lives of other persons." And it appears that the defendant, in the instant case, in the trial court, adopted this definition. Defendant's Instruction No. 27 is in part as follows:

"Wantonness is such a gross want of care and regard for the rights of others as to imply a disregard of consequences or a willingness to inflict injury, and unless the plaintiff has proved that the defendant was guilty of such gross want of care and regard for the rights and safety of others as to imply a disregard of consequences and a willingness to inflict injury, you cannot find the defendant guilty of wantonness and wilfulness. Wilfulness sometimes implies an intention to inflict an injury, and sometimes it is evidenced by such a want of care and regard for the rights and safety of others as implies a complete disregard of consequences. You cannot find the defendant guilty of wilfulness unless you believe from a preponderance of the evidence that the defendant intentionally inflicted the injury complained of, or that the conduct of the defendant indicated such a want of care for the safety of others as implied a complete disregard of consequences."

In passing upon this question the jury were instructed and considered the instruction we have just quoted, and determined from the facts that there was wilful and wanton conduct on the part of the defendant's agent in the operation of the truck at the time of the accident.

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In tessing whom this resting the jury wire isstracted to operatered the instruction we have just noter, and determined from the facts that there are wilful and sunten conduct on the and the determinate agent in the operation of the input of the idea of the orders.

And finally, the defendant contends there was error in the giving of certain of plaintiffs' instructions. We have examined these instructions and believe there is no such error as to justify a reversal of the cause, and that the court was justified in entering judgment on the verdict of the jury. The judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

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LERIS E. PULLIVAR, 1.d. He by the B. J.

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PAULINE MCBRIDE, as Trustee,

Plaintiff - Appellant

V.

APPEAL FROM

CIRCUIT COURT

LEONARD W. BOLTZ.

COOK COUNTY.

Defendant - Appellee.

3001.A. 607

MR. JUSTICE HEBEL DELIVERED THE OFINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered by the court in an action for rent and certain other sums due the plaintiff from the defendant, under the covenants of a lease under seal, which judgment was entered against the plaintiff on the verdict of the jury finding the defendant not guilty.

This is an action by the plaintiff against the defendant, a tenant, to collect a balance of \$400 as rental due under a lease which by its terms expired on August 31, 1939. On or about September 23, 1935, after \$500 was paid to the plaintiff by the defendant to apply on the accrued rental of \$900, the lease was cancelled by mutual consent. The defendant, while admitting that the accrued rental was \$900 on August 6, 1935 and that only \$500 was thereafter paid, contends that at the time of the cancellation of the lease, he relinquished his rights under said lease and entered into a new lease for the premises and paid the \$500 in full accord and satisfaction of all demands of the plaintiff as lessor.

The lease between the parties for the premises in question was dated September 1, 1934, and was for a term from September 1, 1934, until August 31, 1939, at a monthly rental beginning with \$350 per month and increasing annually until the rent was \$500 per month for the final year of the term.

In August, 1935 the plaintiff levied a distress warrant on the property of the defendant in the premises for the \$900 rent due, and shortly thereafter the custodian released said levy, at the direction of the plaintiff, turned the property back and quit the premises.

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There was evidence on behalf of the plaintiff that the defendant. through his agent, offered to pay \$500 to have the property released with the understanding that the balance of \$400 would be paid thereafter; that at the time the \$500 was paid to the plaintiff, as appears from the evidence, the defendant then and there stated he would be unable to go on with the lease and requested the plaintiff to enter into a lease with him for the term of the old lease at a reduced rental; that as a result of the meeting, the plaintiff agreed to enter into a new lease at a reduced rental for a short period. The term of the old lease was five years, and the new lease was for a term of one year at a rental of \$300 per month. From the evidence of the defendant it appears that at the meeting in September with the plaintiff the defendant told the plaintiff that he would pay \$500 in full satisfaction of the \$900 and the other charges. and that as consideration therefor, he would consent to the cancellation of the old leage and would enter into the new lease; that at the time of this conversation there was present with him his brother, who was the manager of the premises and that in the presence of his brother he paid the plaintiff \$500 and got his receipt for it. The defendant was corroborated by his brother, Clem Boltz, who testified he was present at the conversation when the settlement was made between the plaintiff and the defendant, and testified further that "Mr. Jetzinger suggested that my brother enter into a shorter lease; that if my brother gave him \$500.00 he would enter into a new lease and cancel the other \$400.00. My brother said "that meets with my approvel. " There was also offered in evidence by the plaintiff a new lease for a one year period.

The plaintiff contends that the court was in error in allowing the defendants' Exhibits 1, 2 and 3 in evidence; that these exhibits being receipts for rent signed by David Jetzinger and dated April 3rd,

There was evidence on behalf of the plains and the delander. through his agent, affered to pay 5500 to here the armounty ralesand watch the understanding true and bulence of \$600 we had be peld toreafter; that as the time the \$500 one lid to the plaintiff, on appears from the evidence, the defendant then and there stoned be Thisline ed 'meanure bas ar al est fifth an ou of classes et blown to enter into a lesse with him for the term of the cid lerve at a reduced reathl; the entry of the section. The mediate agreed to enter into a new lesse at a reduced reutal for a seart pert od. The term of he old lease was five yours, and the new lease was for a term of one your at a rement of \$300 upp annih. Aron the evidence of the defendent it sensers that a section in september with the glaintiff the defendant told the old thit that the cold pay \$500 in full sa isfaction of the 2000 and the other charges. -elfanava add of transco bluce of .no.scot collerable. co test ted tage tion of the old learn and would enter lite the nea levee; thet dt the time of this conversation there was present with his his brother. who was the manager of the presides and that in the presence of his brother he paid the plaintist \$800 and cot his rescalet for it. The defendant was corroborated by his brether. Oles Poltr, who testified -34 an a saw Jasarileso ont asda mitratavano odi in impeste sew od tween the plaintiff and the defendent, and testified further that "Ar. Jetginger suggered that my brother exter late a shorter lease; that if my brother yave bir \$500.00 he would enter into a new lames and cancel the other 2400.00, My brother sold the coets with my s tilfainfo sof yd abenfivo of bereito oele ase aredf ". Levoroos new lease for a one year period.

The plaintiff contends that the court was in error in allowing the defendants "Thibits 1, 2 and 3 in evidence; tast these arbibits being receipts for rent signed by Bavid Jetringer and dated April Erd.

22nd and May 2nd, 1936, respectively, were not introduced for the purposes of showing that rent was paid under the second lease, and were not proper for the purpose introduced. The defendant contends that the only reason for introducing the exhibits was to show that the plaintiff did not consider that any rent under the old lease was due after September, 1935, and from an inspection of these receipts it does not appear that any amount was due for the balance of the rent.

The verdict is questioned by the plaintiff on the ground that it is against the manifest weight of the evidence. While the controversy in question is whether the sums of money due the plaintiff under the terms of the old lease were discharged by the defendant, still the subject matter was presented to the jury who had all the evidence as well as the exhibits before them, and it is not the duty of this court to pass upon the oredibility of the witnesses or the weight of the evidence offered.

Another question is that the burden of proving the affirmative defense of accord and satisfaction rested upon the defendant, and he failed to prove that defense by a preponderance of the evidence.

There is evidence that the defendant offered cancellation of his lease for the balance of the term and, as agreed to by the parties, a lease for a shorter term was entered into and accepted by the parties. From the evidence of both the defendant and his brother, the adjustment entered into and the receipts signed by the plaintiff for moneys received under the terms of the new lease would indicate that there was not a balance still due under the terms of the old lease, which was cancelled.

While there is also evidence in the record of letters written by Mr. Jetzinger addressed to Boltz regarding the payment

sand and my and, lad, respectively, are not in , wood for the purpose of shoring that rent we puth under its second law, and never not proper for the surpose introduced. The defendant contents that the only reven for introducing the exhibits are so such that the plaintiff did not consider and the prairies the old is as the plaintiff did not consider and they represent the satter deptender, 1985, and from a insertion of there are due after dees not choose this tary wount was due for the volume.

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of the balance due, still, as we have indicated, that question was for the jury to consider, which the jury did and returned their verdict.

As to whether there was adequate consideration to support an accord and satisfaction, that also was a question for the jury, and the evidence which tends to sustain the consideration was the cancellation of the old lease by the parties and the execution of the new lease entered into by them.

For the reasons stated the judgment of the court is affirmed.

JUDOMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND SURKE, J. CONCUR.

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THOME BARNOWSKY,
Appellant,

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MAYFAIR LAUNIRY COMPANY, a corporation, ANTON NOVAK, STEPHEN J. DOMBROWSKI, JOE ROMANICK, FRANK JAKUBIEC and W. A. LEOPOLD,

Appellees.

APPRAL FROM SUPERIOR COURT OF COOK COUNTY.

300 I.A. 607²

MR. PRESIDING JUSTICE SCANIAN DELIVERED THE OPINION OF THE COURT.

This was an action to enforce a claim arising under the Illinois Securities Law (ch. 32, Cahill's Ill. Rev. Stats. 1929). It was tried by the court without a jury. At the conclusion of plaintiff's case defendants oral motion for a finding for defendants was allowed, and plaintiff appeals from a judgment entered upon the finding.

Flaintiff's verified complaint alleges, inter alia, that on June 17, 1930, defendants sold him fifty shares of stock of the Mayfair Laundry Company, a corporation, defendant, for which he paid the sum of \$2,500; that thereafter he discovered that defendants had failed to comply with the provisions of the Illinois Securities Law in that they did not prior to June 17, 1930, nor at any subsequent time, file or cause to be filed in the office of the Secretary of State of the State of Illinois, a statement or inventory of any kind, character or description, as is required by the provisions of the Act, "describing the character of any securities or stock intended to be offered for sale, or sold, or a statement giving a detailed statement of the assets and liabilities of defendant corporation, or a statement of the income and an analysis of the surplus account or an inventory, or an appraisal of the assets of defendant corporation, or a statement, giving the names and addresses of the officers and directors of defendant corporation, or any kind or

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This was an abolion to enforce a claim and a the under the Illinois dequrities for (ch. 50, subility fil., v. take 1990). It was tried by the equit of lout a jury. At the conclusion of plaintiff, even defindents, oral needs of the conclusion of anta was allowed, and blaintiff op, other from a judgment constant upon the findin.

il 'mailie's verdied complaint lasger, int " lis, alt on June 17, ie30, defendent rold him fifey chares of the Mayfair Laundry Jomp. my, a scripore tion, after no, for which he paid the sum of '8,5 ; dut to receiver he discovers on to read with had felled to comply with the provisions of the illimat curified Lew in that they did not rio to June 11; him, not - . may rubdequent time, file or clust the filed in the of its of the servicing of tate of the state of 'limin's ast tement or inventory of liming kind, character or secorapyion, or in required by the provintence of the at, "deportibing the all rester of they " while it of cook intender so be effered for sale, or eld, or : states. This a -sec in the color to selection of the steers of the state believed poration, or a structure of the income one as an Lysic of the turning account or an inventory, or an exercited of the colete of a dendent corporation, or a statement, givin the name, and storms to the officers and directors of efertunt corporation, of any lind or

character of statement or document whatsoever," as is required to be filed by the provisions of the Act; that the capital stock of defendant corporation was not listed on the New York, Boston or Chicago Stock exchange; that plaintiff was neither a broker nor dealer in securities or stocks; that because of defendants failure to comply with the provisions of the Illinois Securities Law plaintiff, on September 5, 1930, September 21, 1932, and April 27, 1933, tendered to defendants the certificate of stock and demanded the return of said \$2,500, and that defendants have refused to return to plaintiff the \$2,500, etc.

The answers of defendants deny, in a general way, all of plaintiff's allegations save the one that plaintiff bought fifty shares of stock and paid \$2,500 for the same.

Plaintiff, a Pole by birth, was fifty-nine years of age at the time in question, and judging from his evidence is illiterate and without business experience. He generally worked as a coppersmith, but before he came to Chicago, in 1927, he had farmed in Montana for some time. On June 2, 1930, he read an advertisement in the "Dziennik Chicagoski," a daily newspaper published in the Polish language and having a circulation of about 30,000, which advertisement read as follows: "Partner wanted with \$2,500 or more, for laundry business which is a corporation and has a great future. Phone Kildare 5839 or call at 4421 Montrose Ave. before 8:00 P.M." (Direction of The address and telephone number were that of Mayfair Laundry Company, a corporation, defendant. On June 3, 1930, plaintiff went to the address designated in the advertisement, which was the place of business of the Mayfair Laundry Company, where he met Anton Novak, defendant, secretary of the company. After a short talk with Novak, the latter showed plaintiff around the plant and asked him to call there the mext day so that he could meet Stephen J. Dombrowski, defendant, president of the company. On June 4, 1930, plaintiff returned to the Laundry Company and there met Novak and Dombrowski. Plaintiff testified that

character of et. tement or secument which is a view of the filed by the provisions of the distriction and the roles of this case of the roles of the

he makers of defendants deny, in a nerel our, the of plaintiff's allegations save she one that duints braining fifty shares of acces and paid (2,500 for the same.

Thinkiff, a Pole by birth, as filly-ning grade of gast the time in question, one jor in from his svidence in illicounts and without business superionee. He canserling worked as a neg avoid the but before by come to this wood, in 1887, we have fourth in makens for some time. In June 2, 1930, be read an advertisement in the "Oziennik Chicagoski," a duity newspaper ablished in the chich lan was and having a circulation of about of file which caverlisement restant follows: "Pertner wanted Aith as how or more, for Landby business which is a corporation and has a great hiters. . home wildows bade or call at 4421 Montrose ve, be one 81 to ... Approximate The address and telophone number were that of legical indry Company, & corporation, defendant. On June D. 1930, pl. init a ut to the daves ed. To acculant to so the entrance of the contract of the cont Mayfair maundry Jonwany, there he mot a nion lovel, builth and, tocratery of the company. . Iter a short talk with Movak, the 1 that showed plaintiff ground the lant on the him to all there the west day so that he sould meet tophen J. ombrought, affining, proulding of the company. On June 4, 1030, plaintial returned to the Laundry Sempony and there mot Wovak and Lombrowcki. Claintiff tearifile that

"Dombrowski and Novak showed me in slips, amount of bills, piece of paper, and he got it on book, and I didn't understand on book and see how money - I saw Novak and Dombrowski on June 4, 1930. They say he is good proposition. I think what we can going to do. and he says, you are going to come over with the money, and then he said you will be all right over here, he said, you will get your pay, and he says, if you are going to work over here, you get your pay, and you going to get dividends besides that. He says, you are going to work, you got steady job, and he going to pay so much if you be good. He said - if you put some money of \$2,500, then he says you got a job here. Then he says, you get your \$20 if you be like that, at least \$20 a week. He says, if it picks up - Yes, you can be sure you are getting dividends besides that. Well, I think it is going to be all right. Then I give it the money, gave it to Novak. I give it to him \$2,500. Then I don't have it - he don't have use for me. When I pay it then he don't have use for me. I work there around from June 9th to September 6th. I get pay \$113. He pay me \$10 a week, he pay me \$15 a week, he pay me \$3.50 a week. Well, he don't want to pay at all, then I quit. I got a certificate for 2 shares of stock. I don't remember when was it. Let's see. Two weeks after the second one. I pay check first. Novak and Dombrowski gave me the 2 shares in the office. Novak handed it to me, over on Clark Street some place. I believe I kept the 2 shares 2 weeks - 2 or 3 weeks. After 3 weeks I asked for what I paid, for the 50 shares; then I ask for 50 shares, I can't understand why it is 2 shares. I asked Novak and Dombrowski. He said, you are going to get the 50 shares and asked me to give the stock certificate back to them. Yes, they are going to get the 50 shares, - Dombrowski and Novak told me when I would give them back that certificate, I will get the 50 shares. Well, that happen right away, what he want to take away that certificate. He want to take away on me in some way and then I see that way what he start fooling around with me, then

Donbrowski and Yovak showed me in align, anount of cills, plees of paper, and he got it on book, and a didn't understand on book and see how money - 1 saw lovek and Domerowald on June 4, 1930. They say he is good proposition. I think has we can coing to do, and he says, you are going to come over with the meney, and then he said you will be all right over here, he said, ou will got your pay, and he care, if you are going to work over here, you get your yay, and you goin to got dividence besides that, the says, you are going to work, you got useasly job, and he going to gay so need if you be good. He said - if you put same money of 'S, 50, then he says you got a job here. Then he says, you get jour gut if you be like that, at lenst (20 a mek. He mays, if it plake up - Yes, you can be sure you are jesting dividency besides that. ell, a think it is oing to be all right. Then I give to the acrey, swe it to Wovek, I five it to him 1,56%. Then I con't have it - he don't have use for me. shed I pay it then he den't have use for me. work there pround from Jun. Oth to Deptember 6th. I get pay 113. He pay me \$10 a week, he pay me 'lb a week, he pay me \$3.50 a week. well, he don't want to pay ni all, then I quit. I got a certificate for 2 chares of stock. I don't remander then was it. Est's sea. Two socks after the second one. I pay check liket. Novek and Dombrowski gave me the 2 shares in the office. Wovak hayded it to me, over on thank street some place. I believe I kept the R sharem 2 weeks - 2 or 3 Leeks. After b weeks I asked for Am t I paid, for the 50 charce; then I ack for 5t charce, I can't understand day it is 2 shares. I saked Novak and 'embrowski. He said, you are going to get the 50 chares and caked me to ive the ...com certificate back to them. Yes, they are soing to get the Westes, - Francroweld and Movek told me when I would give them back that certificates I will get the 50 shares. Lell, that happen right away, what he went to trke away that certificate. He want to take away on me in some way and then I see that way what he start rooking around with me, then

I quit and I ask him the last one. Yes, sir, I know Mr. Beopold. I saw him right in his office downtown. Novak and Dombrowski, he took me downtown. Yes, before I was once, and I was the next one. Leopold said, well, he said, he's got good proposition. Yes, that conversation with Leopold took place before I paid the \$2,500 and some time later I went to Leopold's office downtown and Novak and Dombrowski were there. They took me there. They said he is going to give me 50 shares. When I first went to Leopold's office, I did not have the 2 shares of stock. He gave me the 2 shares of stock at his office. It was on June 5th. On June 5, Novak and Dombrowski took me to Leopold's office, that was the first time I saw him. Q. When you went to Leopold's office, did you already have a certificate for 2 shares? A. No, I not have it. It was on June 20th, second time. When I get the shares at Leopold's office, I kept the 2 shares for about 2 or 3 weeks. No, that time I got that one and he said that way, if you can't make it in the laundry to get signed, then Dombrowski took it in. When I asked Novak and Dombrowski for 50 shares, he put it off, put it off. Yes, put them off, put them off; he don't have blanks, they don't have blanks. When he get blanks, he would give me. There was a few of them besides me, then he would give me. I signed no papers before I got the 50 shares of stock. Yes, I signed, but I don't know what it is, at Leopold's office. He say, sign it up, sign it up. He don't tell me, explain what it is for, just sign it. He read, but I don't understand what was it. No, I don't understand what it mean. Yes, I sign. Well, I say if I get the stock, well, I was going to sign, not before, then he said, you got the stock right here, and then I signed it. No, I sign it the same time when he give me - before he give me that certificate. Then after I sign it a few times, and then he give me that certificate, 2 shares. The 50 shares certificate I got 3 weeks after when I get. It was 3 weeks after when I get. Mr. Owen [attorney for appelled]: We contend that he was given two

. More such in the last one fund the I bee I be a lang l at the section of the control of solito aid at their aid was I book me downtown. Yet, before 1 n a enes, and - a . the name, Loopold said, well, he wild, hate ot good propolices Yes, that conversation with Loopeld took plant before I paid the Eb, 500 and bas Mayor bus m office a callie . Tologood of from I rotal emit emou Dombrowski were there, They took no there, They said he is char bib g ville, it in a for the first time of the sales of mode in the S white a creek. The government in a contract of at his office. It was on func Oth. un June 5, Tov. A and Jordon oweki took me to beepold's office, that the three time I am him. hen you went to beopold's office, 'I'd you all'safe have a sursificate for 2 shares. M. No, I not have it. ": was on June all'ty second time. Non I time have the oblite calles, i reposite the contrast for about 2 or 3 recks. To, that time 1 or that one one he outd that vay, if you can't make it in the laundry to see if not, then Dombrowski took it in. when I maked Wovel one tombrowski for 50 sharer, be pur it off, put it off, Yes, in them off, and them off; he cont shere blanks, they don't have blanks. hen he ret blanks, he hold five me. There was a few of them busides no, then he call ive me. I signed no papers before I got the for shares of breek. Yet, I styred, but I conft know what it is, of Leopold's office. He ray, if mit up, sin it up. He don't tell me, explain what it is is for, just at m it. He read, but . w. sm ii thut. Emit webru t'mob I .ov . ii a w tanw bmatarebmu t'mob I Yes, I sign. .all, I may if I ,et the "tock, woll, I was noin" o sign, not before, then he said, you set its assert is here, and then I si, med it. No, I it m it the km when he live me - before he give me that certificate. There ffor I is it a fow imon, and then he give me that curtificate, I share. The 50 shares conditionte . jeg I medw retha caise. A com II . jeg I medw retha akeew & jeg I Mr. Owen [attorney for appellee] : a contend that he are iven the shares of stock; that he signed the application for the increase; that later, when it was received back, he got his fifty shares. That is the procedure." The witness continued: "Fifty shares of stock I got three weeks after when I get the two shares;" that he received from defendants a certificate for fifty shares of stock in the Laundry Company about three weeks after he had paid defendants the \$2,500; that after he paid the \$2,500 defendants gave him work sorting clothes in the laundry, and other laundry work; that when he demanded his money back "he say the money is gone, you never see it no more."

It is unnecessary for us to consider all of the points raised by plaintiff in support of his contention that the court erred in finding the issues for defendants at the close of plaintiff's evidence, for the reason that counsel for defendants, by the position they have taken in this court, have narrowed the questions to be considered by us. The sole grounds urged by defendants why the action of the trial court should be sustained are as follows: (a) "The stock sold to the plaintiff was in Class 'B' for the reason that it was an isolated transaction made by one of organizers of the corporation and not made as a successive and repeated transaction; " and (b) "while it is true that the burden of proof is upon the seller to establish exemption, this rule is not applicable where the evidence adduced by the plaintiff establishes such exemption." Several times in their brief defendants assert that their defense is that the sale of the stock was an isolated sale by Dombrowski; that he was the owner of the stock and one of the organizers of the corporation, and that therefore the case comes within the ruling in Snitzler-Warner Co. v. Stein, 234 Ill. App. 392. As to point (a), the assumption that the sale to plaintiff "was an isolated transaction made by [Dombrowski] one of organizers of the corporation (italics ours) finds no support in the evidence. During the trial counsel for defendants admitted that plaintiff's check in the sum of \$2,500 "was paid to the

shares of sock; that he migned the a. 1.3. tion for the increase; that later, when it was reserved back, he southwest lifty chares.

That is the procedure. The without continued: "Thisty have of stock I stock I got three weeks firm that I get the two chares; shat he received from defendants a certificate for lifty chares of abook in the Laundry Company about three we ke after he had paid defendants the .2.501; that after he paid the weight of and work sorting clother in the laundry, and other trunds; stock in sorting clother in the laundry, and other trunds; stock in the demanded his masey back "he say the money is sore, you never see it no more."

It is unrecessary for un to consider all of the points raised by plaintiff in support of him contacting int the court orred in finding the issues for defendents of the slope of plaintiffs svidence, for the reason that counsel for datenthers, by the position they have taken in this court, have narrouse the quartions to be opnsidered by us. "The sole grounds under by the author sky the action of the trial court should be such ined are as follows: (a) "The stock rold to the shairtiff was in Class to for the reason that -top end to transport on mad. By one i required betailed as was ti poration and not made at a successive made he weread trupp offense and (b) "while it is true that the burden of proof is usen the caller to open iv call carrie officillate for at elect ald. andidenom deilestes adduced by the plaintill entablithes wash everythen." - everal times eles sis tario defendents ambert tale their defense to tale subof the stock was an isolated sale by Lombrowski; what he was the owner of the stock and one of the organisary of the couper thou, and that therefore the case cames within the ruling in mittaler- respons to. v. Stein, 234 Ill. App. 392. us to point (a), the entumpeter that the sale to plaintiff "was un is that them of my mane by bebt or broken one of organizers of the corporation! (it lie, cure) this no support in the evidence. During the triel counsel for U fondents admitted that plaintiff's check in the sum of , . , Bot for yeid to the

Mayfair Laundry Co. for certificate of stock and that it went into the Laundry, that the Mayfair Laundry Co. got the money." As to point (b), the assumption of fact contained therein that "the evidence adduced by the plaintiff establishes such exemption," finds no support in the record. Indeed, defendants have failed to point out facts and circumstances upon which they base the assumption.

Counsel for defendants concede that "as a general proposition the burden of proof is upon the seller or issuer of securities to establish an exemption, and we further agree that this point was decided by this Court in the cases mentioned in his [plaintiff's] brief, i.e., Taft

v. Otte, 274 Ill. App. 280, and Hudson v. Silver, 273 Ill. App. 40."

In Taft v. Otte & Co., this division of the court, in passing upon the question of the burden of proof, said (pp. 287-288): "In Dobal v. Guardian Finance Corp., 251 Ill. App. 220, 224, decided by the first division of this court, it was said: 'Further, according to the provisions of paragraph 2 of section 37 of that act, Cahill's St. ch. 32, par. 290, subd. 2, the burden of proof is put upon the seller or issuer to establish exemption from the act if exemption is claimed. JJ. McSurely and O'Connor concurred in the opinion, written by Mr. Justice Matchett. In Abrams v. Love, 254 Ill. App. 428, 436, the Appellate Court of the second district held: 'To place the burden upon the plaintiff of proving that the stock in question was not exempted under the act would have the effect of destroying the beneficial purpose intended by the legislature when it enacted the statute. After calling attention to the important fact that the act provides that 'all securities other than those falling within classes "A," "B" and "C," respectively, shall be known as securities in class "D," the court states that a burden practically impossible to carry would be placed upon the plaintiff if he were obliged to prove that the stock did not fall within Classes 'A, ' 'B' and 'C' in order to establish that it did fall within Class 'D. " We further said (p. 293): "Section 37 was intended as something more than a

Hayfair Laundry, that the Layfair remark of a community, that the Laundry, that the Layfair remark of a community of the absumption of 1000 orm, and a community of the absumption of 1000 orm, and a community of the plaintiff of a blishes and a community tinds no support in the recent. Indeed, the tended into into it, to community of the communities of the community of the communities and a community of the communities and a community of the communities and we destrict this soller agrees and all the communities and we destrict the communities and the communities agrees and this community of the community of the

In Raft v. ftte & to. tide division of the comet, in passing upon the question of the burdin of paner, mile (pp. 2:7-185): "In-Lobal v. Sussyian Linence for ... Lil line ... or s. 276, decided by the first division of this cours, it id: 'Arr ther, according to the provisions of paragraph 2 of covion of 70 that the provisions of St. ch. 32, par. 190, subd. 2, the sarden of prest is put upon the al noidesers that the sall and a remain of the first or the sall of the sall o olaimed. If Mchipaly and Offermor Sorganics in the opinion, written by Mr. Justice Matchelt. in jurous v. Love, 254 lls. pp. 426, 436, the pyellate occor of the second of the held: 'To place the burden upon the plaintiff of proving that the sensk in question was not exampled under the not andd have the affect of deternying the beneff stal purpose intended by the la del. ware when it emaked the statute. ! If the calling attention to the important along the the ect provides that tall courtites other than close falling wishing classes 'A," "3" and "G," respectively, shall be known as securities in class "2," the court states that a buscen procede Aly impossible to carry would be placed upon the plaintiff f he were obliged prove that the shock did not rall within Ilease! , ' ' 9' of in refitrel a. "I'd! each middly light bib it i d. deildates of rebro said (p. 293): ".detion 37 was intended as something dors than a

right without a remedy, and if its plain meaning and purpose are not followed the remedy is practically destroyed. The law is a wholesome and necessary one. One who sells securities in this State is bound to know the nature of the same and that he is acting within the law when he sells them; and when his right to sell the securities is challenged he should have no trouble, if he has acted within the law, to justify the sale." We further said (p. 294): "But if a defendant 'relies for his defense upon any of the exemptions provided for in this act' and alleges that the securities sold were exempt, under some paragraph of section 4 or section 5, then the burden is upon him 'to establish such exemption.'"

The real position of defendantsis shown by the concluding words of their short brief, which are as follows: "If this Court is of the opinion that the trial Court not requiring the defendants to introduce evidence to show that the exemption has not been established to a sufficient degree by the plaintiff, that then the cause be remanded for the purpose of permitting the defendants to be heard on that question." Plaintiff strenuously contends that because defendants failed to offer any evidence "plaintiff is entitled to a reversal of the judgment of the lower Court, and a judgment in this Court for the amount of \$2,500 and interest at the rate of 6% per annum from June 17, 1930." It would be very unjust to plaintiff to remand the cause, in view of the fact that defendants able counsel during the trial of the cause admitted that plaintiff's check "was paid to the Mayfair Laundry Co. for certificate of stock and that it went into the Laundry, that the Mayfair Laundry Co. got the money." Defendants, if they had any real defense to plaintiff's claim, had a full opportunity to present it in the trial court, and as plaintiff's evidence tended strongly to prove a scheme to defraud him, it would seem defendants would have then offered to make their defense. They did not see fit to do so.

The judgment of the Superior court of Cook county is reversed

right without a remedy, and if its old in more unpoles in a large not followed the remoty to prectically destroyed. The large who take wholesome and necessary one. One who take seem titled in this take is bound to know the nature of the orms and the heritary of the orms and the feet of the countities the law them he wills the sent that the all the requrities is chellenged he should have no accurate, if he more order thin the law, to justify the sale. S

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the judgment of the superior court of 3 ook county is reversed

and judgment will be entered here in favor of plaintiff (appellant) and against defendants in the sum of \$2,500 and interest at the rate of five per cent per annum from June 17, 1930.

JUDGMENT REVERSID AND JUDGMENT HERE FOR PLAINTIFF AND AGAINST DEFENDANTS FOR \$2,500 AND INTEREST.

Sullivan and Friend, JJ., concur.

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ECONOMY PLUMBING AND HEATING CO., INC., a Corporation,

Appel/lee

COURT OF CHICAGO.

MPPEAL FROM MUNICIPAL

FRANK BURMAN, A. GRIENBER 163-165 N. CENTRAL AVE. BUILDING.

INC., a Corporation,

Appellants.

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MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury there was a finding for plaintiff and against defendants in the sum of \$307.73. Defendants appeal from a judgment entered upon the finding.

Plaintiff's verified statement of claim is as follows: "1. That on or about May 5, 1936, defendants were then the owners, lessors and * * * in charge of the management and operation of the premises located at 165 N. Central Avenue, Chicago, Illinois. 2. That on or about said date they and each of them requested plaintiff to perform the following work on the premises aforedescribed: Repair heater boiler. Furnish and install new boiler tube. Install new submerged water heaters. Replace metal gaskets on jets between upper and lower sections of boiler. Replace corroded flange union gaskets in 6" header. Weld leaky stay bolts of boiler. 3. thereafter plaintiff furnished and installed said work and material above listed in a good workmanlike manner, and defendants then and there agreed to pay for said work the sum of \$307.73. 4. plaintiff has frequently demanded payment of said defendants in said amount but they have failed and refused to pay said sum of \$307.73 or any part thereof. Wherefore plaintiff brings this suit in the sum of \$350.00." Thereafter plaintiff was allowed to file a verified amendment to the statement of claim, which was, in substance, the

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The verified defense admits that defendants were the owners, lessors and operators in charge of the management and operation of the premises in question; denies the allegations contained in paragraph 2 of plaintiff's statement of claim, and alleges that plaintiff and defendants entered into the following written contract:

"April 22nd, 1936

 $k_{,2}$

"Dr. Frank P. Burman, "3500 S. Halsted Street, "Chicago, Ill.

"Re: 165 N. Central Avenue.

"Dear Sir:

"We have examined the heating plant in above building with reference to making the necessary repairs and submit the following proposal:

"We will replace the six (6) jet gaskets which connects the upper and lower sections of the #616 Pacific Boiler.

"We will replace one new flue which is leaking very badly. We will furnish and install one new packing gland which is split on the 2 1/2" return valve and we will replace leaky gasket on flange union at steam main as same is dripping on boiler covering and ruining same.

"We will do the above work in a complete and satisfactory manner, for the sum of (\$55.00) Fifty-five Dollars.

"There is another item that should be taken care of and same will save you 10% of your fuel bill and that is changing the oil pre-heater which is connected wrong. This should be recommended to a new location which will increase the efficiency of the oil burner. We will make this change for the sum of (\$25.00) Twenty-five Dollars.

"Trusting that we may be of service to you again, we are

"Very truly yours,
"ECONOMY PLUMBING & HEATING CO.
"By Chas. M. Ross

"CMR:IB"

The defense denies that defendants agreed to pay \$307.73, and alleges that \$55, the amount specified in said written contract, was all that they agreed and promised to pay; alleges that plaintiff failed to perform the said written contract and that defendants were damaged in excess of the contract price of \$55. Defendants filed a counter-

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"There is another it an live about to taken one of and tame will save you 10% of your fuel will not that is chanting the oil pre-heater which is constited as one. Only another the circumstant of constitution which will increase and officiency of the oil burner. We will make this change for the sum of 185... Twenty-Myo Boltars.

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The defense denier that defensents agreed to pay 357.73, and alleges that \$55, the amount specified in said written converet, was all that they agreed and promised to pay; alleges that plainties sides to pays alleges that plainties sides to pays alleges that desendants were damaged in excess of the contract price of \$55. Defendants sided a counter-

claim, which was stricken; also an amended counterclaim, which was stricken; and leave was given them to file a further amended counterclaim within ten days, but no further counterclaim was filed.

The bill rendered by plaintiff to defendants is as follows:
"May 15th. 1936

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"Dr. Frank Burman,
"3500 S. Halsted Street.

"Re: 165 N. Central Avenue

"Repaired heating boiler.
"Furnished and installed new boiler tube.
"Installed new submerged water heaters.

"Replaced metal gaskets on jets between upper and lower sections of boiler.

"Replaced corroded flange union gaskets in 6" header. "Welded leaky stay bolts of boiler.

"Heaters \$140.00 "Pipe and fittings 14.50 "64 hours labor 96.00 \$1.50 hr. \$250.50 "plus 10% profit and overhead 25.05 \$275.55 "plus 10 insurance 27.55 303.10 "Occup. Tax 4.63 \$307.73"

Defendants contend that they orally accepted the proposal dated April 22, 1936, and that the written proposal and acceptance constituted the sole contract between the parties, and they cite the established rule that "writings showing, upon inspection, a complete legal obligation, without uncertainty or ambiguity as to the object and extent of the agreement, are conclusively presumed to include the entire agreement of the parties, and the omission of any point which might have been embodied does not justify admission of parol evidence." Defendants call our attention to such cases as Telluride Power Co. v. Crane Co., 208 III. 218, wherein the plaintiffs relied on written agreements which defendants sought to qualify or modify by parol evidence. In the instant case plaintiff did not plead a written contract nor attempt to prove one. Plaintiff contends that the written proposal enumerates the specific work that was to be done for \$55, and that it

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There are no controverted questions of levin the cabe. Defendants contend that they or lly coepied the proposal divided in the 22, 1936, and that the written proposal and wheep and and the sole contract between the purview, and they cite the optibilished rule that "writings abowing, upon inspection, a complete legal coligation, without uncertainty or ambiguity as to the object and extent of the agreement, are conclusively progumed to include the oblire agreement of the parties, and the omistion of any point which might have been embedded ".seridants for selecting admission of beredied december of the selecting and the selecting a call our attention to such cames as Telluride fower Vo. v. tranc 10., 208 111. 218, wherein the plaintiffs relied on written agreements which defendants sought to qualify or modify by parol evidence. the instant case plaintiff did not plead a written centrust nor attempt to prove one. Plaintiff contends that the written proposel enumerates the specific work that was to be done for \$55, and that it

does not include any work in connection with the hot water heaters. Mr. Ross. an officer of plaintiff company, testified that the proposal was never accepted by Dr. Burman; that several days after it was sent "Dr. Burman called me on the telephone at the office and told me that he wanted to see me on the premises relative to an inability to get hot water. He said that the tenants were all complaining and threatening to move out. Q. Now, Mr. Ross, I will ask you if any of the work set forth in the proposal touches upon the question of hot water? A. No. Q. All right, just go ahead and tell us what happened? A. I met him on the premises about a week after that, down in the boiler room of the apartment building and he was telling me about the trouble he was having with the hot water and I told him after an inspection that he would have to install new heaters, because there was a coating of lime on the outside as well as on the inside of the coils, and that they should be replaced with larger heaters. Q. Tell us what you noticed about the heaters? A. Well, they were under-sized to start with. They had been in there for eight or ten years and had never been cleaned or had a flushing. They had never been taken out and there was considerable sediment and coating to be removed from the tubes. Q. What about the position of the tubes? A. The two tubes on the side were not giving service at all and I recommended that he install larger ones. Q. Did you have any discussion with Dr. Burman as to what your charges would be for all the work and materials furnished? A. No. Q. Did you at any time ever discuss with him the question of what the charges would be with reference to the work done? A. I told him that I could not give him any idea about it until we had removed it and could see the contents of the heater. * * * Q. What did he say with reference to your recommendation regarding the changing of the tubes and coils? A. He said to go ahead. Q. How soon after that conversation did you start work there? A. Several days afterwards. Q. Did you sub-let any of that work? A. Yes, we did. Q. Which work did you sub-let and to whom? A. We sub-let the work on the

does not include any work in couractian . h the how reach beares, Mr. Ross, an officer of plaintiff company, we will the proposal war never accepted by Dr. Lumming that asviral of the after it, was sont "Dr. Burmam called me on the telephone as the chies and clome that he wanted to see me on the premise . . it. wive to an inability to net not water. He said that the tent it was all complaint and that director ing to move out. [. Tow, Mr. dord, "All sett you if my of the term set forth of the the troposed today the control of how with A. Wo. Q. All right, just go ahoud and tell as that happy of ... I met him on the premise, should beak aloss the provide the total of room of the apartment building and he ugo builter me about the touble he was having with the he cater and a relative in the an ampaction and no read a contract of the read and the contract of the contract of tens on the calcide on the oblight all no as also as oblighe end no emil to they should be replaced with larger hes ters. . Jell un that you noticed about the heatrrey A. wall, whey are ander-mined to start with. They had been in there for al hi or ten julia and had never been cleaned or had a Tlaubing. They had nover econ then cut and there wer considerable software and sociar to be recoved from the tabas. U. abla and we and he a full . . . well, say to not lead and take the regard filetar to the same not are all and the state of the first to the same and the same and the same are same as the same and the same are same as the same are same ones. Q. Ald you have any alocuation with ar. Burnen as to wind your charges would be for all the work and enterials fur hand. A. Ho. Q. Did you at any time ever di cual dish the thi question of what . A remon know eak or engurelan dai. ed bluow acquado edi that I could not give him my idea, soil you mid svin in bluce I tadt and could see the contents of the heater. int cir he say with reference to your recommend ton testrain the char ing of the tubes and coile? A. He said to go thead. .. For soon efter that conversation did you start work in ref at a dereal coys from rds. Q. Did you suo-let any of that works A. Yes, we did. .. Mich we sub-lot the hork on the work did you sub-let and to whom? A.

submerged heaters, the removing of the heaters and installation of the new heaters, and the circulation gasket on top of the steam heater. Q. To whom did you sublet that work? A. To the Central Welding and Boiler Repair Company. Q. Did they do any work on the premises? A. Yes, they did." Upon cross-examination the following occurred: "Q. Well, you said that you met Dr. Burman two days after you mailed the proposal? A. I said several days, two or three days. Q. Now then, was that in response to your proposal? A. No, sir. Q. Where did you see him a few days later? A. In the boiler room at 165 North Central avenue. Q. Was that where the intended job was located? A. Yes. Q. Did he talk to you about the proposal you had mailed him? A. No, sir. Q. Is it not a fact that he told you to go ahead with your job? The Court: What was the entire conversation? A. He met me in the boiler room and told me about his water problem. I said, 'Give me this job and I will take the tubes out and if I find they are too small, or badly coated with lime, then I will replace them. He said to go ahead. Q. Did he have the written proposal with him at the time? A. No, mir. Q. I want to know why didn't you send him another proposal, if that was the case? A. He wanted me to give him a price there and I told him I could not give him a price until we took the heaters out and see what condition they were in and if I found them in such a condition that I could replace them I would go ahead and charge him ten per cent over my overhead." The witness also testified, on direct, that plaintiff received a bill from Central Welding and Boiler Repair Company for the work they did on the premises; that the amount of the bill was \$157.55, which plaintiff paid; that the total charge made by plaintiff was very reasonable; that "we installed new tubes for the ones that were leaking, new heaters were put in, a side-armed jet, and gaskets. * * * We changed the circulating piping between the tank and the heater." Defendants made no effort to show that the work in question was not furnished, nor that it was notreasonably worth

submerged heaters, the removing of the heaters and install then of the new Meaters, and the circulation expiret on top of the chann heater. Q. To Thom did you sublet that work? A. To the Central Welding and Boiler Repoir Tompany. . . Did they do may verk on the premises? A. Yee, they did. " Upon erose-exemination the following occurred: "(. Well, you said that you may broman too days after you mailed the proposal? 4. I said several days, two or three days. Q. wow then, was that in response to your proposal? A. No, sir. (. . here did you see him a few days leters .. In the boiler room at 165 Forth Central avenue. . . as that where the intended job was located? A. Yos. . iid he talk to you about the proposal you had asiled him? . . Wo, sir. . . is it not a fact that he told you so go ahead with your job; The Court; that was the entire converentiony . Its met me in the bollor room and told me about his water problem. I said, 'dive me will job and I vibad to the take out and if I ind they are too small or bading coated with lime, then I will replace them. He said to go ahead. G. Did he have the written proposel with him at the time? A. To. Lagorg rentene min dien you want to kno. or thew I . D . The if that was the case? A. He wanted me to give nim a price there and I told him I could not give him a price until we look the heaters out and see what condition they were in and if I come sham in such a condition that I could replace them I would go akend and charge him ten per cent over my overhead." the witness also testified, on direct, Though taking bus inities fatting that I lie a newlect Thinking tent Company for the work they did on the premises; that the amount of the bill was \$157.55, which plaintiff paid; that the total charge made by plaintiff was very respondible; that "we installed no tubes for the ones that were leading, new heaters were put in, a 'ide-armed jet, and gaskets. * * * .e changed the circulating piping between the tank and the heater." Defendants made no effort to show that the work in question was not furnished, nor that it was notre-sone bly worth

the amount charged by plaintiff for the same. Abram M. Greenberg, defendant, who was associated with Dr. Burman in the operation of the building, testified that "when I came back from the bank, thay had the entire boiler and a set of new heaters in there." Defendants never rejected this work nor ordered the removal of the same. testified that several weeks after plaintiff had billed defendants he talked with Dr. Burman about the bill at the latter's office. The witness testified as follows as to the conversation: "Q. What did you say to him and what did he say to you in that conversation? A. Well, he wanted to know if I could knock off ten per cent. He said he did not think it would run that much. I said, 'All right, I will do it. Then after a little further talk he said to come back a couple of days later and he would give me a check. When I finally did reach him, he told me to go and see his lawyer." Dr. Burman testified that after he received the written proposal from plaintiff he called up plaintiff's office and told Ross that he was the lowest bidder and "can go ahead with the work," that he did not see Ross until about three or four months after the job was given and the bill had been rendered; that he never talked with him about the payment of the bill but told him that he would have to take up the matter of the bill with the bondholders' committee.

Narrowed down, the defense amounts to this: That defendants orally accepted the written proposal, that they had no further understanding with plaintiff, and that therefore all that the latter could claim of them was the \$55 mentioned in the written proposal. Defendants argue that "all the plaintiff wanted was to get one foot in the premises and then it felt that it could make its charge as it so pleased or desired;" that "it all simmers down to the fact that the plaintiff endeavored to gamble with this Court and did gamble successfully with the Court below. It felt that it could always get the contract price and it would take a chance on the plan." The trial court gave no weight to this argument of defendants, and we are satisfied

the amount sharped by plaintiff for the twee, orac f. Greenberg, defendant, who was accocisted with Dr. Burman in the open ties of the building, tossified that "when I came lack from the bank, they standard . ".ereid al erespon won to tear bars relied eritae and ban never rejected this work nor ordered the removal of the same, testified that several weeks offer planning her billio defendants he talked with Dr. Burman about the bill at the latterts office. The witness testified as rollows is to the opportunities; and the did you say to him and what did he say to you in that o myers though A. sell, he wented to knew if I could knock off ten pre cent. He said he did not think it would run that much. I sais, 'all right, I will Then ofter a little further tell he said to see beck a couple of days later and he would give me a check. hen I finally did reach him, he teld me to go and see his larger." In Rurann testified that efter he reactived the written proposal from plaintiff he called up plainfiff a office and told Ross that he was the lowest bidder and "can go chead vith the work," clast he did not see Nowe until about three or four months after the job was given and the bill had been rendered; that he gever talked with him .bout the payment of the bill but told him thet he would have to take up the matter of the bill with the bencholders' committee.

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that he was justified in so doing. Plaintiff sued upon an oral agreement, and the question as to whether or not there was such an agreement for the work sued for was a matter to be determined from the evidence. It is agreed that all negotiations in reference to the work took place between Mr. Ross and Dr. Burman, both of whom testified.

This case was tried without a jury, and the finding of the trial court is entitled, on review, to the same weight as the verdict of a jury, and where the evidence is contradictory, such finding will not be reversed, unless it is contrary to the manifest weight of the evidence. We are satisfied that defendants have failed to show that the finding of the trial court is contrary to the manifest weight of the evidence. Indeed, there are certain mountain peaks in the evidence that fully justified the trial court in adopting plaintiff's theory of fact. The circumstance that plaintiff sublet the part of the work pertaining to the hot water system to the Central Welding and Boiler Repair Company and paid that company \$157.55, is very significant; also the further circumstance that defendants retained the set of new heaters.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

that he was justified in no coing, blain is sued upon an eral agreement, and the quertion as to another or no. In resum, such an agreement for the cook and for that a militer to be determined from the evidence. It is agreed that all negotiations in telerance to the work took place between her. Your say see humans, took of thom tentified.

This case was tried attact, a jury, and it within of the trial court is entitled, on revier, to it ease adjust at the versict of a jury, and where the evidence is contradictory, such finding will not be reversed, unless it is contrary to the manifest weight of the evidence. We are satisfied that very damp have falled to show that the finding of the trial over, is court by to the manifest white of the the evidence. Indeed, there are a utilize account in something of the trial over the trial court in accounts of the evidence that fully justified the trial search in something plaintiff the originary of fact. The aircuratione what this laintiff subject the part of the work pertaining to the hot a for system to the Comitmi clospeny and said that company is \$7.5%, is very significant; also the further discussinged that alendants relatined the set of now besters.

The judgment of the runicipal court of thicky is alliamed.

Sulliven and Friend, J.T., concur.

40345

CLAUDE WAYLAND,

Appellant

V.

CITY OF CHICAGO, a municipal corporation, Appelled

APPHAL FROM CIRCUIT COURT,

COOK COUNTY.

300 I.A. 608

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

November 8, 1935, Claude Wayland, plaintiff, was injured as the result of a fall on an allegedly defective sidewalk on Archer avenue, Chicago. He brought suit against the city to recover damages, and had a verdict for \$35,000. The court granted defendant a new trial. The cause was afterward retried, resulting in a verdict and judgment for defendant, and plaintiff has prosecuted this appeal for reversal of that judgment.

The accident is alleged to have occurred at about a quarter past six o'clock November 8, 1935, when plaintiff, while walking in a northeasterly direction on Archer avenue, stubbed his toe or stepped into a hole in the sidewalk in front of the premises known as 4157 Archer avenue and was thrown forward on the walk sustaining severe injuries.

As ground for reversal it is urged that the verdict of the jury was manifestly against the weight of the evidence; that improper conduct and remarks of counsel and of the court, made during the trial, prejudiced plaintiff's case so as to produce a verdict in favor of defendant; and that the court erroneously instructed the jury in several respects.

With reference to the charge that defendant's counsel prejudiced plaintiff's case by his conduct and remarks made during the trial and in his argument to the jury, the record discloses the following cir-

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CLAUD TAYLAND,

appellant,

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CITY OF CHICAGA, a municipal corporation, apolica

own sum.

ME. JUSTICE WHE AND DETAY THE TER TOW OF MIC COUT.

November 5, 1935, Claude appland, plringiff, was informed as the result of a fall on an allogedly defective sidewalk marcher avenue, this go. We brought suit against the city to recover damages, and had a verdict for "3", and . Inc court granted defendant a new trial. The cause was offer, and retried, resulting in a verdict and judgment for defendant, and limitif has proceduted this appeal for reversal of that judgment.

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With reference to the charge that defend not connect projudiced plaintiff's case by his consuct and remarks made during the trial end in his argument to the jury, the record discloses the following cir-

cumstances: With no evidence in the record to support it, defendant's counsel made the statement in his argument to the jury that "when you were examined Mr. Zazove told you that I was a former partner of W. W. Smith and Clarence Darrow. I don't know why he told you that. Maybe to let you know that at one time, with Clarence Darrow, I defended men who were charged with crime, for their liberty and their life. I, too, was a prosecutor for this County. At the outset of this trial I wondered why I, who had never had the experience before in my life in the trial of this kind of a case, was assigned to this particular case, but after getting into it and after listening to the testimony of the witnesses in this case, probably the Corporation Counsel of the City of Chicago felt that this case required the services of a criminal lawyer. *** And I want to say to you men at the outset, that by the widest stretch of the imagination you would not, and could not expect that the plaintiff in a civil suit in this country would bring to you under oath the type of testimony that they submitted here for your approval. You talk about the criminal law, I say they are guilty of obtaining by means of false pretensions, they are conspiring against the City of Chicago to get money from the City of Chicago." Mr. Zazove, who was conducting the trial for plaintiff in association with another counsel, objected to these remarks as being highly prejudicial, and thereupon defendant's counsel emphasized the statement by saying, "I charge it." The court sustained the objection, and directed the jury to disregard the remarks.

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In another part of his argument defendant's counsel made the following statement: "If this case were being tried in the Criminal Court of Cook County and the State would produce the type of evidence that they have produced here and ask twelve men in the jury box to take away the liberty or the life of a man on that testimony, regardless of the difference in the proof, the jury would not be out five minutes but would come in and return a verdict of not guilty, and it is true, and

cumstances: .ith no evicures in 'es recore es represt it, defendant's counsel made the ct. toment of it and entre the jury that when you were exemined Mr. Lazove rold you what I were a furner plot of you were find to works commend the this . . . To rentre you that. Maybe to let you know that it one time, with clarence Darrow, I defended men the tere charged with orim: , in their liberty and their life. I, too, see a prosecutor for this fourt, I the outset of this trial I wondered way I, he at dever he the exertence before in my life in the trial of this kine of a cours, was assigned to this particular case, but after years into it was after listening to the tectiony of the witnesses in this case, probably the Corporation Councel of the sity of the chit this care required the services of a orthinal hayer. ... ad harris so eav to you men at the outset, that by the widest sire the ine imarine tion you would not, and could not expect that the black in a cly'l suit in this country would bring to you under outh the type of testient that that they silmed the love your emproyed, led believed that salit to agree of gradited to till one you, yet I was Leninho pretenations, they are con string against the slay of Science to set money from the City of Thick of Mr. Large, who was conducting the trial for plaintiff in association with another coursel, objected to these remarks as boing highly or ; dictal, and thereugor defend nits councel emphasized the statement by sayla, "I charge lt." The court sustained the objection, and directed the jury to disregard the remarks.

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the jurors here are no different than the jurors there. *** For a few paltry dollars men will swear their souls away, their lives away, they kill, cheat, and everything else for money. Barnish tried to tell you that other people fell there, but I impeached him. I charge it to Zazove, to Heitz, and the other men in this case. What is the purpose of it, money, money, money, money. You see it running through this case. You are citizens of the City of Chicago and they are asking you to pay that money. Hasn't the City of Chicago the same rights as others, as Zazove, and his investigators that we call chasers."

In another part of his argument defendant's counsel made the following statement, without any evidence to support it: "Something happened to Wayland before he got to 4157. It could have happened in the store, he could have slipped downstairs and got the back of his head against a sharp step; that would do it. They have to prove it by a preponderance of all the evidence of the case, and if there is a doubt in your mind, you have to resolve that doubt in favor of the City of Chicago."

The simple issues presented to the jury were whether a defect in the sidewalk rendered the city liable for damages and the extent of plaintiff's injuries. Plaintiff asserts that defendant produced a large number of police officers to testify; that their testimony was in no sense damaging to plaintiff's cause, but that their appearance in connection with the attorney's argument incited prejudice and passion on the part of the jurors. This statement is made in support of the contention that defendant's counsel sought by his remarks to draw an analogy between the trial of this cause and a criminal proceeding, and to create the impression that plaintiff, Zazove, his associate and investigators were "guilty of obtaining by means of false pretensions" and were "conspiring against the City of Chicago to get money from the City of Chicago." Counsel's argument to the jury was entirely unwarranted and was not based upon any evi-

the jurous here are no different that juries there, *** For a few paitry dollars men will wear that sould away, their lives anay, they kill, chart, one are relating the money. Berish tried so tell you that along people fell there, but I implicable him. I charge it to descre, to desite, and the other men in this case.

I charge it to descre, to desite, and the other men in this case.

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Indicago the some reghts we get that money, then't the dity of this others, as lancy, and it investigators that we call charts, as lancye, and it investigators.

In another partion his a grammit defendant's councer made the following statement, whithout any evidence to support it: "cueshing happened to expland before he jot to 41%. It could have happened in the stere, he could have raipped downsteirs and got the back of his head against a charp stap; that would so it. They have to prove it by a proponderance of all the evidence of the cous, and it there is a doubt in your mind, you knye to resealer that Coub in fever of the City of thickness.

The simple issues presented to the jury term whether a defect in the sidewall rendered the city lieble for damages and the extent of plaintiff's injuries. Plaintiff asserts the testify that their produced a large number of policy of details, to tablify that their testimony was in no sense damatin, to satisfy a quee, but their testimony ance in sensetian with the attency; argument incits project and passion on the part of the jurors. This steamnt is made in support of the contention that their derivation of the contention that their derivation of the contention that the factor of this country by his remarks to draw an analogy between the trick of this or use and a criminal prospecting, and to steam the impression that plaintiff, associate and the estigators were "poilty of obtaining by means of false are beneford" and were "conspiring against the city of thicage to get maney from the City of Chicage." Counsel's argument to the fury was entirely uncertained and case not based upon thy off the total of the country of the country

dence to support it; nor could these remarks be regarded as justifiable inferences from any proof adduced upon the hearing. Defendant's counsel argues that his remarks to the jury were justified under the rule laid down in Commonwealth Electric Co. v. Rose, 214 Ill. 545. It was there said (p. 561): "Counsel may arraign the conduct of the parties, and impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, or assail the credibility of witnesses when it is impeached by direct evidence, or by inconsistency, or incoherency of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances." (Italics ours.) Plaintiff finds no fault with the rule enunciated in the foregoing decision, but says that there was no evidence to warrant so vicious an attack upon the motives, conduct or credibility of plaintiff's counsel or witnesses. We have found no evidence in the record to justify defendant's counsel in invoking the rule for which the city contends.

It is unnecessary to review at length the voluminous testimony adduced upon the trial, but plaintiff's proof may be briefly summarized as follows: Wayland testified that he was 54 years of age, employed as manager of the Scott Burr Stores, a subsidiary of Butler Brothers, with which concern he had been associated since 1930, and that he earner an average of \$3,500 a year. He stated that while walking northeast on Archer avenue on the evening in question, he stepped in a hole in the sidewalk, his foot caught, causing his body to twist, and that he threw out his right hand and fell, striking his hand and head on the sidewalk about the same time. There were several witnesses who saw the accident and testified for plaintiff. Defendant offered no eyewitnesses at all, but presented five police officers who testified concerning their investigation subsequent to the occurrence, and a father and daughter, who lived at 4157 Archer avenue, neither of whom saw the accident. Some of the witnesses said that plaintiff fell forward on his stomach, and defendant's counsel argued to the jury that this could not have

which is a remark in it will be sent to go i drow to be excess challed a will be seen in the control of the contro will will all their state out of bline for all the lorder after III. 545. It was sing some production along the character was conduct of the problem and input, success, include a condense we's it are no convenient and or year of the same of the set of the exectivitity of the summary and it is a summary to be sufficiently or by incommittency, or inschiringy of their but them, there is a of testinging, their applicated upon the carea of alcower amost betsioner the total the hor world disgrals (.amo molles) in the fore roins decline, but they that the second of the The latter of the second of the latter of the second control of the second control of the second of also be or one, meants . not even to be meet at thinking to To be the contract of the ment of a state of the contract of the organization of the contract which the city centerior.

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produced a laceration and fracture on the back of the head, and inferentially defendant's counsel went so far as to suggest to the jury that the nature of the skull injury could have been produced only by contact with a sharp edge, such as the corner of a stair, and that he might have fallen down the stairs in the store where he worked, and not on the sidewalk, as he claimed. In view of the testimony of the eyewitnesses, there was no room for any such argument. Defendant evidently recognized the location of the accident, because the police officers who examined the sidewalk shortly after the occurrence testified as to the condition thereof, and the suggestion of counsel that "something happened to Wayland before he got to 4157, it may have happened in the store, he could have slipped downstairs and got the back of his head against a sharp step; that would do it," was not warranted by the evidence.

Moreover, it was argued to the jury that plaintiff had to prove his case not by a preponderance of the evidence, but "if there is a doubt in your mind, you have to resolve that doubt in favor of the City of Chicago." This is contrary to fixed principles of law, and urged the jury to apply the reasonable doubt rule invoked in criminal cases in a civil suit for damages. That sort of argument was harmful, prejudicial to plaintiff, and should not have been permitted.

There are also charges that the court was guilty of improper conduct to the prejudice of plaintiff, and several instances are quoted from the record indicating what plaintiff's counsel asserts was a hostile attitude on the part of the court. We think it unnecessary to discuss these charges, but merely reiterate what has often been said by the courts, that the judge's conduct in the presence of the jury in unnecessarily reprimanding plaintiff's counsel may indicate bias in the case and should be avoided. This is particularly true in the trial of a cause where the evidence is sharply conflicting and where the jury may, from the court's attitude, gain the impression

produced a laceration and fracture on the hook of the head, and inferentially defendant's doubsel went at for the surject at the inferentially defendant's doubsel went at for the start of the setup of the such as the control of sealt, and that he mile with near the start, as the control of the sealt, and that he mile have action direct entire is inference the symmetry of the eyemithersalm, as no control of the symmetry of the eyemithersalm, as no control of the ageministration of the such and the format and the because the police officers who ear increase the sidewalm control of the said and the seation of councel that "semethin, manners to the allowing the said of the first has a to the condition that all the selection, appeared to the first action of councel that "semethin, manners to tayl and active he got to first, it may have appeared in the sterm, we could have slipped downstairs and you use no or his west clark a surpressed to the first and the sterm and the council to the sterm of the surpress of the surpress of the sterm of the surpress of the s

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that the judge has an opinion one way or another as to the credibility of the witnesses or as to the merits of the cause.

Complaint is made that the court erred in charging the jury on several important phases of the case. It is urged that instruction No. 10, tendered by defendant, was improper. By that instruction the court charged the jury that plaintiff was required by law to establish his case by a preponderance of the evidence before he could recover, and that if he had not so established his case, or if the evidence was evenly balanced so that the jury were in doubt and unable to say on which side the evidence preponderated, the verdict should be not guilty. This form of instruction was held to constitute reversible error in Hurzon v. Schmitz, 262 Ill. App. 337, wherein the word "established" was likewise used in a similar way. The court there said (p. 339): "In a civil case a plaintiff is entitled to recover if the evidence creates probabilities in his favor, - that is, that the weight of the evidence inclines to his side. (Crabtree v. Reed, 50 Ill. 206.) A plaintiff is not required to establish any elements essential to a recovery. (McMasters v. Grand Trunk Ry. Co., 155 Ill. App. 648.) The word 'establish' ordinarily means to settle finally, to fix unalterably. It is not necessary in a civil action that any fact should be established that is, settled certainly, or fixed permanently - which may have been uncertain, doubtful or disputed before. " And after citing numerous cases, the court concluded (p. 340): "The instruction placed a higher burden upon appellant than the law required. It was very much like telling the jury that appellant was required to prove the facts stated to the satisfaction of the jury or beyond a reasonable doubt. Instructions requiring a plaintiff to prove his case by a clear preponderance of the evidence, to produce evidence to satisfy the jury, or to prove certain facts to the satisfaction of the jury, have been frequently condemned. (Crabtree v. Reed, 50 Ill. 206; Rolfe v.

that the judge has an opinion one off or Checker as in the exectinality of the vitnesses or as to the wattr of the Checkers

Compleint is wade that the comet dured in chargin the jury on several important phases of the case. It is urgo that instruction No. 10, tendered by defendant, the improper. By timt in a ruculon the court charged one jury that plaintiff as a required by Lew to establish his case by a grapord reades of the syndered before he could recover, and that if he had now o established his aces, or if the evidence was eve ly belanced in that, he jury were in and and able to say on which side the evidence prevenderated, the vernict should be not suilty. Shis form of instruction was hald to constitute reverside error in Hurano. v. chmist, 16. 11. pp. 537, wherein the word "established" as likewise used to a samilar tary, The court there said (p. 351); "Yn a civil case a phoneiff is entitled to recover if the evicence erector of the pilts in the favor, - that is, that the .eight of the evisence incliner to his eide. (drybtree v. Heed, 50 Hil. 206.) A plaintiff is not required to establish may elements essential to a recovery. (Neutanta v. Grand Trunk My. 10., 155 111. mg. 648.) the were tentralinat ordinarily me no to soltle limelly, this wenter while the to messary in a civil action in a sny first should be established that is, settled correctally, or fixed permenently - which may have been uncertain, doubtful or offered before," ad after siting number our eases, the court concluded (p. 340); "The instruction wheed a higher burden upon angellant than the law resulted. It was very much like selling the jury that appullent was required to prove the facts stated to the satisfiction of the jury or beyond a resconsile subt. Instructions requiring a plaintiff to prove his crue by a clear preponderance of the cylindes, to produce evidence to catally the jury, ur to prove certain facts to the satisfaction of the jury, 't.ve been frequently condemned. (ir btree v. ieed. to III. 900; dolfe v. Rich, 149 Ill. 436; Sonnemann v. Mertz, 221 Ill. 362; Teter v. Spooner, 305 Ill. 198.)

Complaint is also made of instruction No. 11-b, tendered by defendant and given by the court. This instruction was as follows: "The court instructs you as a matter of law that if you find from all the evidence in this case that the plaintiff's injuries are not the result of any negligence on the part of the City of Chicago in allowing or permitting any hole, dugout, or depression, to be or remain in and upon the sidewalk here in question, but that the plaintiff's injuries, if any were sustained, resulted solely and exclusively from the existence of a difference in level between two slabs of the sidewalk here in question, then in such case I charge you, as a matter of law, that the City of Chicago would not be liable for any injuries sustained as the result of such mere difference in level." The rule laid down by the court in this instruction is erroneous, and inasmuch as there was a sharp conflict in the evidence as to the condition of the sidewalk such an instruction might well have produced the verdict in favor of defendant. The issues of negligence on which plaintiff tried the cause were threefold: (1) The existence of the hole, dugout, or depression; (2) the insecure and dangerous condition; and (3) the disrepair of the sidewalk. The evidence of substantially all the witnesses disclosed that there was a depression in the walk, whereby one slab was lower than an adjoining one. Plaintiff argues that this elevation rendered the walk insecure. There was also evidence that the walk had been broken in places and filled with dirt. Notwithstanding these circumstances, the court charged the jury as a matter of law that the city would not be liable if the accident and injuries resulted solely from the existence of a difference in level between two concrete slabs in the sidewalk. It is conceivable that a very dangerous situation may be created by difference in the level between slabs in a sidewalk, and that a

Hich, 149 111. 436; Bonnessonn v. Mertz, 281 111. 362; 281 v. spoquer, 305 111. 198.)

Complaint is also sade of instruction yo. 11-t, to dered by defendant and given by the court. This instruction was as roy il said wel to rettem a ne may atouriant truco edi" : swolfer find from all the cyldence in this ease that the plaintiff a injuries are not the renult of any meghinence on the . It of the dity of Chicago in allowing or permittin any hole, ourcut, or depresenten, to be or remain in and upon the sidewalk hore in question, but that the plaintiff's injuries, if any mure sustained, results, acledy and exclusively from the existence of a liff are see he level between two slebs of the allegalk here in question, then in such case I charge you, as a marker of law, that the City of this or would not be liable for any injurion subjected on the result of much nere difference in level." The rule laid down by the court in this instruction is erronous, and inaduuch as there was a sharp omflict in the evidence as to the condition of the aldewalk such an instrucoff . Industry and the vertical in rever of the product the maint. issues of norligence on which plaintiff tried the cause were threefold: (1) The existence of the hole, durous, or depression; (2) the inscours and dengerous condition; and (5) the disrepair of the sidewalk. The evidence of substantially all the hitnesses disclosed that there was a depression in the walk, hereby and slab was lower than an adjoining one. Plaintiff argues that this elevation rendered the walk inscours. There was also evidence that the balk had been broken in places and filled with dirt. Notwithstanding when circumstances, the court charged the jury as a matter of law that the city would not -tolde if the accident and injuries resulted : olely from the exipt once of a difference in level between two comercia al ha in the side. walk. It is conceivable that a very dangerous situation may be created by difference in the level between slabs in a widemail, and limit a

pedestrian walking briskly along the walk may stub his toe, may fall headlong and sustain injuries. In Fromme v. City of Girard, 295 Ill. App. 144, an action was brought against the city for damages sustained as the result of a fall upon a sidewalk raised above the level of an adjoining section by growing roots of trees, which defect was known to the street superintendent, and a verdict for plaintiff was sustained.

Criticism is also leveled at instructions Nos. 16 and 21, the first of which was offered by defendant and given, and the second tendered by plaintiff and refused. Since the objections to these instructions are fully discussed in his brief, we assume that upon retrial care will be taken to obviate the objectionable portions thereof.

After a careful examination of the record we have reached the conclusion that plaintiff did not receive a fair trial. A new trial was granted in the first instance because the city presented certain affidavits relative to plaintiff's conduct and that of his counsel, and not because of any question affecting the alleged liability of the city. The issues before the court and jury were simple; they involved the presentation of evidence from which the jury were called upon to find facts and determine whether defendant was liable and, if so, the question of damages. In the determination of these questions the jury were undoubtedly influenced by the prejudicial statements and arguments made, and the verdict of not guilty may well have been produced by these arguments. We are therefore of the opinion that the cause should be retried. The judgment of the Circuit court is accordingly reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

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Teanlan, F. J., and 'ulliven, J., ourour.

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JOHN E. ERICKSON,

Appellant,

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ARTHUR J. OLSON et al., individually and as BONDHOLDERS' PROTECTIVE COMMITTEE OF PAULINA APARTMENTS.

Appellees.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

300 I.A. 608

MR. JUSTICE FRIEND DELIVERED THE CPINION OF THE COURT.

John T. Brickson, an attorney at law, brought suit in the Municipal court for attorney's fees in the amount of \$650, against Arthur J. Olson, Eva Mentges, Ella J. Peetz, Emil Johnson and A. J. Roeder, individually and as Bondholders' Protective Committee of the Paulina Apartments, then under foreclosure, claiming that his services were rendered at the special instance and request of defendants, individually and as a committee. Trial was had by jury, resulting in a verdict and judgment for defendants. Plaintiff appealed.

It appears that some years prior to September, 1934, a foreclosure case was filed by J. Hilding Johnson, as trustee, against William Patterson et al., as cause No. B-270049. The defendants herein constituted a bondholders' protective committee, organized in connection with the foreclosure proceeding. The attorneys for the trustee in the foreclosure case were Urion, Bishop, Sladkey & Boutell, who were in no way associated with plaintiff.

Early in September, 1934, Roeder, one of the defendants, who had been acquainted with plaintiff, suggested to him that the committee was dissatisfied with the progress of the foreclosure case because no apparent action was being taken to bring the proceedings to a conclusion. The trustee had taken possession of the

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JOHN B. ARICHUCK,

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ARTHUR J. CLEGY St al., individually and :a BORDH-LULLAY TROT OFTVS JONANTE N: OF PAUNCHA APACTMENTS,

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John d. Michaen, an asterney of low, brought suit in the Municipal cour. for esseriet, less in the August of 8650, egoingt irthan J. Cleon, we notiges, alts J. Pesta, mil Johnson end A. J. Roder, individually and as Sonoholders' protective Committee of the Pauline Apartments, then under foreclosure, claiming that his services were rendered of the special instance and request of defendants, individually and as a committee. Trial was had by jury, reculting in a verdict and judgment for defendance. Flaintiff appealed.

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darly in September, 1854, Rosder, one of the defendents, who had been acquainted with plaintiff, suggested to him that the committee was disastisfied with the progress of the forselosure case because no apparent action was being taken to bring the proceedings to a conclusion. The trustee had taken possession of the

premises being foreclose, was managing and collecting the rents thereof, and the committee was apparently dissatisfied with the progress being made. Notwithstanding the fact that the committee had been soliciting and accepting the deposit of bonds under a certificate of deposit purporting to have been issued under and pursuant to a definite deposit agreement, bearing date November 11, 1933, no deposit agreement had in fact been entered into. Accordingly plaintiff was invited to attend a meeting of the committee and confer with its members.

There is evidence that plaintiff familiarized himself with the problems at hand, advised the committee of the necessity of having a bondholders' deposit agreement, and rendered various other services, including the preparation of such an agreement, obtained leave of court to enter the committee's appearance in the foreclosure proceeding, filed a cross bill asking for the appointment of a receiver and other affirmative relief, and prepared answers to a questionnaire which had been sent out generally to bondholders' protective committees by the Sabath congressional committee seeking information relative to foreclosure proceedings in the United States.

There was evidence introduced on behalf of defendants that
Roeder had warned plaintiff at the outset that there was no way of
obtaining any fees for him unless he could devise a way of disposing
of the attorneys then representing the complainant, inasmuch as the
committee had no funds with which to pay an attorney, and that plaintiff would have to look only to the foreclosure proceedings for any
fees that he might ultimately obtain. At the various meetings attended by plaintiff, members of the committee inquired whether he had
succeeded in removing the attorneys then in charge of the foreclosure,
but this apparently could not be accomplished.

Until some time in September, 1934, plaintiff made no request for fees, nor did he send defendants any statements for services rendered. Thereafter and until January, 1935, the question of fees was

premises bein, foreclose, as man tin the self out. The restrict thereof, and the committee and preprint classical alignment of the committee and progress being made, dotathe ading the formal of the court of the order of the been religious and selection, the deposit of categories of the proposit purposition to the court of the conformal proposit supposite the mans, we wing dute lovedhoor lightness of the conformal of the conformal of the conformal plants and the conformal plants and the conformal plants and the conformal plants and the conformal the combets.

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presented for the committee's consideration at various times, as indicated by the minutes of its meetings, and ultimately plaintiff was induced to put his understanding as to fees in writing, and a letter was addressed by him to the committee, dated January 5, 1935, in which he said that for all services rendered by him to that date, including the draft of the depositary agreement, conferences and preparing answer and cross bill in the foreclosure proceeding, he had no thought of holding the committee members personally liable unless he was discharged. According to the pleadings and the evidence all the services for which fees are claimed were admittedly performed before January 5, 1935, the date on which the letter was written to the committee.

The issues of fact submitted to the jury were therefore two-fold: (1) whether plaintiff had been employed by the committee, and (2) whether he had been discharged. Defendants argue that under the arrangement had with plaintiff he was never actually employed, but was merely given the opportunity to appear in the foreclosure case with the sanction of the committee in an effort to supplant other counsel, and that if he were successful in his attempt he would be entitled to petition the court for the allowance of a fee for the services rendered in the foreclosure proceeding.

upon receipt of his letter the defendants by concerted action proceeded pursuant _/ to an appointment with him to officially notify him of his discharge, and it is argued that he was discharged, and under the terms of his letter to the committee of January 5, 1935, he therefore became entitled to be paid for the services he had theretofore rendered. Three of defendants witnesses denied the discharge and said that when plaintiff admitted that he could not supplant the other lawyers in the case he was told that there was no use of his continued efforts. The two questions of fact which counsel on both sides agree were the only

presented for the committee to actime of the volume of between indicated by the maputes of its mestings, and carried of order das induced to put ils un res join, as a fole n . life ; and w letter was addressed by him to the commistes, onted samely 5, 1950; in which he had do not dow with - vice, routered by him o the contest including the drait of the dependent agreement, considered and type paring answer and exocal bill in the dericlodure parasoning, he had no thought of Folding the committee members per or the libble onless us ent like po . . . vo ent in spair of part of the con . begradoib and services for which fees are claimed were admissedly partermed baiore Jenuary 5, 1955, the date on which the latter was artisen to the . sett immoo

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On the question of his discharge, plaintiff whiteen that upon reseipt of his latter the defendants by concerted action proceeded to an appointment ith him to officially willy him of his another ge, and it is crawed that he was dish tred, and and a tame of his letter to the committee of Junuary by 1985, in charoford bucking entitled to be paid for the ways in hid theretelor rendered. Three of defendents witnesses denice the discharge and Dric size the plaintiff admitted that he could not supplent the other lenyers is the case he was told that there was no use of his continue efforts, The two questions of fact which coursel on both sides were the only

issues submitted to the jury were thus presented to the jury by competent evidence, and it became a question of fact for the jury's determination as to whether plaintiff had been retained, also whether he was discharged, and therefore whether he was entitled to recover for the fees claimed.

The only ground urged for reversal is that the verdict is manifestly against the weight of the evidence and that it resulted from a misconception of the evidence and prejudice against him, and should therefore not be permitted to stand. There is no claim that the court erred in anywise in the conduct of the trial, and so far as we are able to ascertain the hearing was fairly conducted and the jury was fully and properly instructed as to the law applicable to the facts. Under these circumstances, the law applicable to the case is well settled; the verdict will not be disturbed upon appeal unless it is manifestly and palpably against the weight of the evidence.

(Shearer v. Aurora Z. & C. R. Co., 200 Ill. App. 225; Monahan v. Metropolitan Life Ins. Co., 207 Ill. App. 200.) And all questions of fact are deemed to have been settled by the verdict, if they are fairly presented, and the reviewing court will not interfere with the jury's finding thereon. (Shearer v. Aurora Z. & C. R. Co., 200 Ill. App. 225.)

After a careful review of the record we have reached the conclusion that the verdict of the jury on the conflicting questions of fact presented is amply supported by the evidence and is not contrary to the manifest weight thereof, and no other error being assigned we think the court properly denied plaintiff's motion for a new trial and entered judgment upon the verdict. The judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur-

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clusion that the vertical of the jury on the condicting quartions of fact presented is analy supported by the vidence and is not condictly to the manifest weight the perf. and no other error being assigned we think the court property during plain that a notice for measurable and entered judgment upon the vertical. The judgment of the manifest affirmed.

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Scanlan, P. J., and ulliven, J., concur.

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ANNA LAROCCO

Appellee,

JOSEPH ANTONELLO. Appellant.

PPEAL BROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against Joseph Antonello and Robert Walquist, to recover damages for personal injuries sustained by her when Antonello's automobile, driven by Walquist, in the course of Antonello's business, collided with another automobile in which plaintiff was a passenger. During the progress of the trial the suit was dismissed as to Walquist. The jury returned a verdict finding the remaining defendant Antonello guilty and assessing plaintiff's damages in the sum of \$7,500. Antonello appeals from the judgment entered on the verdict.

Since defendant's liability is not questioned it will be unnecessary to state the facts pertaining to the accident. As ground for reversal it is urged that the jurors were improperly examined on voir dire, in that (1) the question of insurance carried by defendant, Antonello, was injected into the interrogation of jurors for the purpose of informing them that the burden of a judgment would fall upon an insurance company instead of defendant, and that the purpose of the inquiry was not made in good faith and was prejudicial to defendant; (2) that the court erred in refusing to allow defendant, Antonello, to withdraw a juror because of alleged improper remarks of plaintiff's counsel in the presence of the jury during the dismissal of codefendant, Walquist; (3) that the court erred in instructing the jury; and (4) that the verdict was excessive.

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with reference to the first contention it appears that prior to the impaneling of the jury plaintiff filed a petition asking that she be allowed to examine the prospective jurors, touching their interest in the Union Automobile Indemnity Association. Her petition alleged that defendant, Antonello, at the time of the accident, carried liability insurance with this company, whose office is located at Bloomington, Illinois; that it represented him and had entered the appearance of its attorneys, Beverly & Klaskin, in the defense of the suit; that the insurance company is vitally interested in the cause, and is actually engaged in defending the same; that it has a large number of policyholders in Cook county, as well as other persons who are interested in the company, who may be called as prospective jurors; and that unless plaintiff be permitted to examine the jurors, touching their interest in the company, her interests will be unduly prejudiced.

The propriety of allowing the examination of prospective jurors in accordance with the prayer of the petition was discussed by court ... and counsel in the court's chambers, out of the presence of the jury, and it was finally suggested by the court that the first panel of four jurors be examined before the noon recess as to their other qualifications, and thus afford the court an opportunity to read the decisions tendered by counsel and decide the question of procedure at the beginning of the afternoon session. Accordingly, the first four jurors were examined and accepted by counsel for plaintiff, and at the beginning of the afternoon session, the court having decided to permit the interrogation, the first four jurors were asked by counsel for plaintiff the question: "Q. Are you interested financially, either as stockholders or otherwise, in the Union Automobile Indemnity Association?" Each juror answered in the negative. The next prospective juror was thereupon examined upon his voir dire, and asked a similar question, and he likewise answered in the negative. Defendant's

to the impaneling of the jury plataliff filter a getter of the interest in the jury plataliff filter a getter of the inferior to the interest in the Union the presentive faces, the second of the interest in the Union theorem, and indicated the interest in the Union the interest in the Union the face of indicated the interest in the interest of the state of the state

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question, and he likewise and ered in the neg tive. Dafond atto

counsel thereupon objected to asking the same question of each juror, and the court ruled that it would be better to propound one question after the examination of each panel of four. Substantially the same interrogatory was thereupon propounded to the second panel and their answers were in the negative. Before tendering the third panel to counsel for defendant, plaintiff's attorney repeated the interrogatory to the last panel of prospective jurors, and their answers were likewise in the negative. At this stage of the proceeding and out of the presence of the jury, defendant's counsel moved the court to withdraw a juror because of the repeated asking of this question, which was denied.

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Defendant's counsel concede that under the authorities in this state prospective jurors may be interrogated on their voir dire as to any interest in an insurance company which may have insured the defendant on trial against liability for accidental injuries, where the inquiry is for the purpose of exercising the right of challenge, but they say that this privilege is discretionary with the court and should be exercised only where it clearly appears that plaintiff is proceeding in good faith and where a showing has been made that the inquiry is necessary for the preservation of plaintiff's rights; that in the case at bar there was nothing in the petition itself to justify the inquiry, inasmuch as no allegations are made to show that an investigation was conducted by plaintiff disclosing knowledge or information that would justify the bringing of the name of the insurance company to the attention of the jurors, or that plaintiff knew or had any reason to believe that the veniremen called might or could have been stockholders of the insurance company; and it is also urged that the repetition of the question four or five times unduly emphasized the interest of the insurance company in the case .

Courts of this state and of other jurisdictions have had frequent occasion to consider cases in which the interest of an

counsel thereupon objected to askin the same userupon of each inter, and the court ruled that it would be botter to promound one question after the examination of each penel of four, thoutentfally the name interrogatory sas thereupong propounded to the sacond pagel and their answers were in the negotive. Before tendering the third panel to counsel for defendant, chainsiff's Assemply repeated the interrogatory to the list penel of prospective jurors, and wheir answers were likewise in the negotive. .. t bid. of the proceeding and out of the presence of the jarr, definition. countel. mixed beregger all to empand rough a northista of truce out beyon .bsinob asw doids , noiteoup sind to

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Jourts of this state and of other jurisdictions have had frequent occasion to consider cases in which one interest of an

insurance company, not a party to the suit, has been disclosed to the jury. The procedure is always a delicate one and should be approached with caution, because the mere mention of an insurance company in the presence of the jury more than likely conveys to the jurors the fact that defendant carries indemnity insurance, which is likely to influence the jury's verdict, both as to the question of defendant's liability and the assessment of damages. On the other hand, it is to be remembered that plaintiff's right to an impartial, disinterested jury is equal to that of defendant and that plaintiff is entitled to such an examination of the gurors as will disclose whether they are free from prejudice to his interests, and there is no difference in a court of justice between the rights of litigants to a fair trial. It would obviously prejudice a plaintiff's case if a person carrying insurance in a company representing defendant were permitted to sit on the jury, and there is no way that a plaintiff can ascertain except by interrogation, whether a juror is interested in a defendant's insurance company, without an investigation, the expense of which would be so enormous in a county such as this as to make it prohibitive. Moreover, there is always the possibility that claim adjusters or investigators may become witnesses in the trial of a case, and plaintiff is entitled to know the possible interest of any juror in an insurance company or its employees. The courts of this state have therefore held that an inquiry such as this may be conducted. if made in good faith, and for the purpose of exercising the right of peremptory challenge. The leading case on this question and the last expression of the Supreme court is found in Smithers v. Henriquez, 368 Ill. 588. In that case prior to the calling of the jury and out of its presence, plaintiff made an application for leave to ask the jurors if they were interested financially, as stockholders or otherwise, in the American Employers' Insurance Company. Plaintiff had filed an affidavit in support of her application, which was allowed over

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defendant's objection. The affidavit charged, and the defendant admitted, that the suit was being defended by that company and was represented by its counsel. It further stated the plaintiff belianted that unless her counsel be allowed to question prospective jurors as to their financial interest in the insurance company, her rights might be seriously prejudiced. The affidavit was in all respects similar to the one filed by plaintiff in the case at bar. A single question proposed to be asked of the jurors was submitted, and the examination was ordered to be limited to that question, which was follows: "Are you, Mr. Long, or any of you gentlemen, interested financially, either as stockholders or otherwise, in the American Employers Insurance Company? There was no response by any juror, and the inquiry was not pursued. It was there claimed that the purpose of the inquiry was a mere subterfuge and a clever guise to get before the jury the fact that the insurance company was defending the suit, and the court held that if that were true, the conduct of plaintiff's counsel could not be too strongly condemned. The court reached the conclusion, however, with two of the justices dissenting, that plaintiff, in disclosing to the court and opposing counsel in chambers, the purpose of his inquiry before any attempt was made to interrogate the jurors, and the attending circumstances indicated that the inquiry was made in good faith and for the purpose of exercising the right of challenge and was therefore proper.

In reaching this conclusion the court made an exhaustive review of the decisions in this state where they had on previous occasions justified the right to interrogate jurors as to their financial interest in an insurance company, and concluded that the inquiry should be made in good faith and so conducted as to eliminate if possible any resulting prejudice. The procedure followed in the case at bar was in all respects similar to the inquiry in <u>Smithers v. Henriquez</u>. While it is undoubtedly a

derendent's objection. The a lidery's oblige, on the a landers bas yeacher a sai. yo hobrelob theod same time of that the best times Tall of La off. If to toffted all alexander at the bottomerter name aviceogate, mottaur, or breathe ed france and smaller that bewelled jurors as to their financial interest in interest of as arong, her rights might be seriously projected. The might vis and an all respects similar to the and filed by it in the art of religion. single question proposed .. be ked of the jas or the testicod, and the examination was areas to be blacked, a shrul creation. which was relicous. " To you, Mr. Jon , or my i you maken, interported linearially, sither as well and or other das, in the To so was east of ass exact through the sons the target of the solution. Sany juror, and one in thing as mot partition. It is the fact that govern a fine engineeren erra i en en verment ede fo es og my odt taut where o somether one tone the ten the server of order to ot order was defending the suit, out the court tell the clift of the two. the conduct of judinalist acumeel and do not be only condemed. The court re end the smooth sime, he even, tich two of the justices discensing, that ! leintiff, in the chashe to the court and opposing coursel in the above, the purpose of his injury before any attempt was made to interage to the jurer, and the strains of them stances indic ted of , the injuing ... made in goo' Thish and for the purpose of elecabing the right of circlings and was therefore proper.

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The second ground for reversal is that the court erred in refusing to allow Antonello to withdraw a juror and declare a mistrial on the ground of improper remarks of counsel for plaintiff in the presence of the jury during the dismissal of the codefendant Robert Walquist. It appears that during the trial plaintiff discovered, for the first time, that defendant's driver, Walquist, was a minor, and his counsel then moved to dismiss him from the case. Obviously, a valid judgment could not be entered against him without the appointment of a guardian ad litem where the court is aware of his minority. Defendant relies on sec. 52 of the Civil Practice Act (1937 Ill. Rev. Stats., chap. 110) which provides in effect that the plaintiff mayat any time before trial begins, upon notice to defendant, dismiss his action as to any defendant on the payment of costs, and that after the trial has begun he may on the same terms dismiss a defendant either upon the stipulation of the parties or on the order of court entered pursuant to the filing of a verified petition or affidavit setting forth the ground of such dismissal. The record discloses that although the motion to dismiss was made orally and in the presence of the jury, counsel for plaintiff did later file an affidavit at the direction of the court setting forth as ground for dismissal the fact that Walquist was a minor, eighteen years of age. Inasmuch as the jury would ultimately have been informed of the dismissal, we think defendant was not in anywise prejudiced by the procedure followed.

Criticism is made of two instructions given on behalf of

better proctice to tek the question of headyedy of the julone, as was done in the latter case, we do not this will restrict on of the question in the latter case, he has never eithy jar, according the complusion remained in initiates v. Penriques is emercial in this proceeding, and who same reasons which promoter the court in that case to justify the injustry of the processive justs are applicable to the processor fallower in this course.

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Criticism is made of two instructions given in behalf of

plaintiff. Instruction No. 10, dealing with the question of damages, included as an element of damage "her loss of time and inability to work, if any, on account of such injuries," and it is argued that since plaintiff was a housewife she was not entitled to be compensated for loss of time. The complaint alleges that plaintiff "has been and is unable to manage her affairs by reason of her said injuries," and the jury having before it the circumstances indicating the nature of her station in life and occupation, were qualified to determine whether she should be compensated for any loss of time.

With reference to instruction No. 7 it is argued that the jury was not confined to evidence offered as to damages, but were permitted to indulge in the belief that their own estimate as to damages was controlling. This instruction charged the jury that they were to estimate the damages "from the facts and circumstances in proof, relating to the subject of the extent of plaintiff's damages," and this we think was a proper charge; it limited the jury to a consideration of the facts and circumstances in proof or in evidence and was not misleading. Moreover, the court discussed the instruction with counsel for both parties and when it was being considered the court suggested to defendant's attorney that if he had any objection to this particular instruction it would not be given, but defendant's attorney advised the court to "go ahead and give it." Under the circumstances defendant is not in a position to complain thereof.

The remaining ground relates to the assessment of damages. The facts disclose that plaintiff was sixty-six years of age. Her medical bills and expense up to the time of the trial were \$811, and her physician testified that she would need future medical attention. As a result of the accident she suffered from a skull fracture, accompanied by a concussion and eleven fractures of the ribs. Two of the ribs were broken in two places and the other six

plaintiff. Instruction (o. 10, dealin which the cuestion of the ges, included at an element of came of ther lose of the confict to modifity to vork, if any, on account of with injuries," and it is arrand that since limited were not orbible to be comparable of the for lose of the mode, The complaint alleges that latinish "has been and it unable to manage has affected by reader of her wild injuries," and the jury having before it the circumstance including the the nature of his station in life and companion, where in loss of time determine whether the chould be compensation, where of the chould be compensation, and loss of time.

jury was not confined to evidence offers. A to demajor, but were permitted to indige in the collect that that one eximpted to indige in the collect that that one extent the jury that demages was centrolling. This instruction charges the jury that they were to ertimate the damages of it is accepted to july that in proof, relating to the subject of the extent of juliating the the subject of the extent of juliating the jury demages, and this we think was a proper charge; it limited the jury to a consideration of the facts and site was tanger in proof or in evidence and was not micloading. Accover, the considered the court angles the toth parties and the action of the interested the court angles the parties and the court angles the parties and the court angles the particular instruction is neally be given, but defendant's attorney whise the court of a close and give it." Under the circumstances defendent is not in a position to complete the circumstances defendent is not in a position to complete the circumstances defendent is not in a position to complete the circumstances defendent is not in a position to complete the circumstances defendent is not in a position to complete the core.

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were not only fractured but broken to such an extent that they overlapped and will so remain permanently. Plaintiff was unable to perform her usual household duties incidental to the taking care of her home and four people, and there is evidence that her vision was permanently affected. She undoubtedly suffered much pain and discomfort, and as a result of her injuries her usefulness is greatly impaired. Upon this state of facts we do not think the verdict of \$7,500 excessive.

Referring again to the inquiry of the prospective jurors as to their interest in the Union Automobile Indemnity Company as applcable to the amount of the verdict, the court in Actitus v. Spring Kalley Coal Company, 246 Ill. 32, cited in the Smithers case, said that if it appears that the jury was not actuated by passion or prejudice on that account a verdict will not be disturbed, and in the Smithers case the court said if the case were close on the facts it would not hesitate to reverse the judgment because of an improper examination of the jurors. In this proceeding defendant's liability is not at all questioned. From a careful examination of the record we have reached the conclusion that the verdict was not produced by passion or prejudice on account of the injection of defendant's insurance company into the case, and that no reversible error was otherwise committed in the trial of the case. The judgment of the Circuit court should be affirmed, and it is so ordered. JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

were not only fractured bus broken is tuch an extensibility overlapped and will so require permanently. Whim iff was unable to perform her usual none load dubles incired and their solding care of her home and four people, and there is evidence that her viction was permanently offected. The unfoubtedly suffered much pain and discomfort, and as a result of her injuries her unofulness is greatly impaired. Upon this sit to of facts we do not till the two verdict of 17,550 excessive.

Referring equin to the inquiry or the prospersive jurors as -iggs as gragued gatemates wildomotus coled and all amercani riods of eable to the assume of the vertict, the contrain will un verting Salley Coal Company, 246 Ill. 32, cited in the caliber case, sold that if is spears that the jury was normans by passion or prejucted in that allowet a vertice rill pot b. The unbed, and in the Paithman care the dear; said if the constant shore on the facts it would not besitate to reverse the judgment become of an improper oxemination of the jurces, in this proceeding telendentia liability is not at all questioned. From a careful on minution of the record we have reached the conclusion the the vertice was not produced by passion of prejudice to account of the injection of defendent's insurance company into the ones, and thus no coversible orner was otherwise committed in the trial of the darc. The joing ment of the direct court should be filmed, and it is so ordered. THE RESIDENCE OF THE RESIDENCE OF THE PARTY OF THE PARTY

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ALEX POLATSEK,
Appellee,

v .

DR. MANDEL COHEN, Appellant. APPEAL FROM SUPERIOR COURT,

300 I.A. 608

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Alex Polatsek, plaintiff, brought suit against Dr. Mandel Cohen, defendant, for damages resulting from an alleged assault and battery by defendant. The jury returned a verdict in favor of plaintiff for \$2,500, and in response to an interrogatory propounded to the jury, as to whether the action of defendant was wilful and wanton, the jury answered in the affirmative. On the hearing of defendant's motion for a new trial the judgment was reduced by remittitur to \$1,500. Plaintiff filed a consent to the remittitur, and the court entered judgment for \$1,500, from which defendant appeals.

The statements of plaintiff and defendant as to the occurrence are so utterly at variance as to be hopelessly irreconcilable. Defendant is a physician who has maintained an office and living quarters at 47th street and Lake Park avenue, Chicago, for more than 17 years. Sunday evening, June 28, 1936, plaintiff entered defendant's office and living quarters at about 8:30 p.m., and according to plaintiff's allegations, defendant "without cause given him therefor by the plaintiff," shot and discharged a pistol, wounding plaintiff in the left thigh and in the calf of the right leg, severely injuring him.

Defendant presents an entirely different version. He testi-

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Alex lolation, paidmini, brow is also also also also be admit Brown and defendant, der dockers remaising from an alleged evenal to and institution by defend me. The jury resummed a vendicting of the plaintion for the jury, and in response of derivative and jury, and to the jury, and to the jury, and to the jury are not be solved of the jury are not to be jury and the jury are not by the jury are not to the second to and are not the content of the second to the second to

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wright presents an entirely different resion. He tasti-

fied that plaintiff, who was sitting in the waiting room, jumped on him when he came into the hallway and frightened him; that the witness called the police immediately; that he saw two other men with plaintiff, one of whom was pointing a gun at him; and believing he was in danger and in fear of his life, defendant discharged his pistol downward once to frighten the men away, then called the police, told them he had shot a man, was given permission to attend a patient seriously ill, and thereafter went to the police station and explained the occurrence to Lieutenant Berounsky. Fred J. Lyons, a disinterested witness, testifying for defendant, said that he saw two men coming out of the hallway leading to defendant's office and run east toward the Illinois Central Railroad viaduct, the man in front having his hand at his back pocket as he ran. Martin Turbow, another witness, correborated defendant's testimony, saying that he saw plaintiff and two other men drive up to defendant's mother's house in an automobile shortly before the occurrence, and that plaintiff then went to the doctor's office and afterward drove away with the two men. Berounsky, police lieutenant, also corroborated the doctor by saying that the doctor called up the police station and later came in himself, and Berounsky testified that when he saw plaintiff after the shooting he seemed to be under the influence of liquor.

As ground for reversal it is urged that defendant did not have a fair trial by reason of the improper examination of witnesses and remarks of court and counsel, and that the verdict of the jury was the result of passion and prejudice and against the manifest weight of the evidence. We refrain from commenting in detail on the evidence adduced upon the hearing as the cause will have to be retried. From a careful examination of the record we are convinced that defendant did not receive a fair trial, and that the verdict and affirmative answer of the jury to the interrogatory who ther defendant's cenduct was wilful and wanton, might well have been produced by manner

fied that of theiff, who was t this to the the and to de ent the garden of the compact of education continues and mosts aim no re the state of the relief the state of the relief of the relief with plainiff, one of show w , inthe or a climated blicking sid begines in many in the latter of the region of correct to be region in correct picton downward one. So fix this will see the orline the prince told them he hed shot a more, we see the more near a ford bed and media block mericusty ill, and therealth was a fact that the statement ed the occurrace to tenter at berounder. First 1. 4 cm; t ten intercated withdray to digital to an india of enter batcorein east toward the "lift oil Joylevil willies " w was, who me i for it may having his brane of this hook goodees an assume he will in burn, and a with the service service of the color etalities, et la come vier care tite out ben litelate was house in on subcassile of or ily offers a clear chae, as their year open on a college of the order of the first field at the college of the coll with the two man. Jureuming, police lieute man, the o en oboquited motives a weiling out our relieur reduced and the gargest yet reduced and and leter come in himself, and derrorrige to till and amon retail bus ent plaintiff situr the abouting he accessed to the incluence . TON HE TO

As ground for reversed it is ungestable defending did not have a fair twial by select of the impreparace, in view of the fury and remarks of cours and remarks of cours and remarks of cours and remarks of cours and remarks of course and remarks the result of parateness of the end of the result of the sylvence. Early from commencion, in action of the sylvence address upon the harring on the cause will have at he retainsting of the reservance of the first course will have at our convinced that tried. When a careful examination of the reservance of the jury to the interrogatory should end of the first was wilful one remains the attended of the convent of the first convents.

in which the case was tried. The following excerpts from the testimony illustrate some of the incidents that occurred on the hearing: It was defendant's contention that plaintiff was under the influence of liquor, and together with two other men attempted an attack upon defendant which provoked the shooting. Lieutenant Berounsky testified that he smelled liquor on plaintiff's breath after the occurrence. The court struck out this portion of Berounsky's testimony, saying "it was an assumption on the part of the witness," that "he was not an expert," and that "he cannot qualify as an expert smeller."

When defendant's counsel asked about plaintiff's reputation in the neighborhood, the court said: "That hasn't a thing on earth to do with this. The president of the United States could shoot somebody, and he has a fairly good reputation." Defendant had several well known men in the neighborhood as character witnesses, including Spencer W. Castle, editor of the Hyde Park Herald, a local newspaper; Judge Daniel P. Trude of the Circuit court; John F. Keeley, an assistant to the judge of the Probate court; and Lieutenant Joseph Berounsky of the Hyde Park station. All these men were neighbors, living in the general locality where defendant had resided and practiced medicine for a great many years, and it was highly prejudicial for the court to discredit the effect of testimony of this character.

when Dr. Cohen was on the stand the following questions and answers were made: "The Doctor: I smelled whiskey on the man. The Court: You couldn't be a better expert than the lieutenant. Strike it. The Witness: I know the smell of liquor on the breath, etc. The Court: Can you tell what age it is when you smell it? The Witness: No, your Honor, I can't. Q. Not that good? A. No." Afterward, when James J. Collins, a police officer at the Hyde Park station testified: "I think the man [plaintiff] had been drinking a little bit," plaintiff's counsel objected and asked that the

in which the care was tried. The folicing accompte for the testimeny illustrate some of the incidents. The observed on the hearing: It was defendent's contention that plaining as under the influence of liquer, and allowed which two other med authorist the influence of liquer, and allowed the shorting. Liquing the satisfied that the shorting. Liquing the strict the shorting is in a course truck out this person of extent effect the course truck out this person of strongly a testiment, adving "it was an allowed on the carnot the witness," that "he was not an expert," and that "he carnot qualify as an expert smoller."

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Afterward, when James J. Collins, a police officer at the Hyde Perk

station testified: "I think the man [plaintiff] had been drinking

station testified: "I think the man [plaintiff] had been drinking

answer be stricken, but the court permitted the answer to stand, saying: "He seems to have stated it as a fact." If the testimony of one police officer on the question of plaintiff's sobriety was competent, it is difficult to perceive why that of others should not have been submitted to the jury for what it was worth, without any comment by the court.

In testifying to the extent of his injuries plaintiff said: "I was not able to when I went to work, but it was necessary to go to work or starve, since I did not have any money in my possession." He also testified that after leaving the Chicago Hospital he went to the police station and inquired about the status of the case against defendant, and that while there some one said to him: "You are a mighty small man to do anything with Dr. Mandel Cohen, because Dr. Mandel Cohen is an influential doctor and you are a poor fish;" that "that was what they said to me, and I went home." Plaintiff's attorney carried this type of examination still further by asking Berounsky the question: "In this case, then, after you know the defendant shot a man, you still let him go until he had made his calls?" Dr. Cohen testified that he had a patient desperately ill and when he first reported the matter to the police he asked whether it would be agreeable for him to call first on the patient and report at the police station thereafter, and Berounsky had evidently given him permission so to do. The effect of this type of examination was undoubtedly prejudicial and must have conveyed to the jury the fact that the police officers were extending favors to and regarded defendant as an influential man in the community as against plaintiff, who, according to his testimony, was characterized as a "poor fish" by the officers at the station.

When John F. Keeley was called as a character witness on benalf of defendant, plaintiff's counsel and the court propounded the following interrogatories upon cross-examination: *Q. You call answer he stricken, but the could permitted the under the content saying: "He seems to have stated it is a fact." If the testimony of one police officer on the cuestion of plainitudes and lots and competent, it is difficult to perceive why that of others should not have been submitted to the jury for shot is a court.

In tentifying to the attent of Min inject . Alin in the tell of or fill with a real rate of the state of the state of eld. John wew I. to words or starve, place I die not lave any mensy in my peace rion. " He also testified that after leaving the Chica o Mongian he want to the police station and in wired about the obstus of the case gold rmi. c. bles ero erra creat aldle took but theine is tenings are a mighty small may on to emptide with Dr. Dondel oghre, because Dr. Mandel Cohen is an influential dostor and you are a poor fish;" that "that was what they said to me, and I went lone." Illinitiff's attorney carried this type of examination still further by oaking Berounsky the question. "In this occe, then, after you know the aid show ben sa firm o, mid tel fill boy was a soda imabastob fill, John tootified that he had a pationt desparately ill and when he wire reported the mant or or sele police or is a check whether it would be agreechle for him to call first on the pattumb and raport at the police station thereafter, and Barcansky has attioned, iven him permission so to do. The effect of this type of examination and undoubtedly prejudicial and must have conveyed to the jury the fact that the police officers were extending favors to and regarded defendant as an influential man in the community as against il initial who, according to his testimony, was characterized as a "poor fish" by the officers at the station.

hen John F. Keeley was called as a character tiness on behalf of defendant, plaintiff's counsel and the court propounded the following interrogatories upon cross-examinations "4. You call

yourself an assistant judge of the Probate Court? Don't you?

A. No, I don't. I said assistant to the Probate Judge. My

title is not deputy clerk of the Probate Court. Q. Is there

such a thing as an assistant to the Judge of the Probate? A.

That is correct. Q. You are a lawyer, aren't you? A. I am,

sir. Q. Can you show me in the Statutes? Mr. Hoover [attorney

for defendant]: I object to that. Mr. Haft: Let's look in the

Statutes. A man says he is a Judge. The Witness: I didn't say

that. The Court: Do you hold an elective or appointive office?

A. Appointive. Q. Judges are elected, aren't they? A. Judges

are elected. I make no pretense of being a judge."

As hereinbefore stated the evidence of plaintiff's and defendant's witnesses was utterly irreconcilable, and in that situation it was extremely important that the case be fairly tried without any improper remarks by either court or counsel or the examination of witnesses in such a manner as to create prejudice against either party. Some of the evidence hereinbefore set forth might easily have produced the verdict and the affirmative response to the interrogatory as to whether or not defendant's action was wilful and wanton, and we have therefore reached the conclusion that justice will be better served if the judgment is reversed and the cause remanded for a new trial.

Defendant complains of several instructions relating to the burden of proof, the weight of the evidence, damages, and the question of wilful and wanton misconduct, but no specific objections are made as to these various instructions, and plaintiff's counsel say defendant did not object to them when they were tendered. All the instructions complained of relate to fundamental principles of law and upon a retrial the parties should have no difficulty in presenting to the court approved instructions on the various phases of the cause.

For the reasons given the judgment of the Superior court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

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Defendant com tains of strend instruction, fillering to the the business of anything to the question of milling and remains a confuse, but no to affice the thing and thing and remains to the evertous for tructions, and their lifts strends as sey enfendent did not object to the limb lay are appeared. In the tructions amplified or restrict to the interestions amplified or restrict to remain and a restrict the provide the chard mental arthritish the provide absolute to the very the fault to the restrict the security of the restrict of the

of the eguse.
For the readons given the judgment of the Supertor con. is reversed and the equae readons for a set treat.

ALONZO A. POPE, administrator de bonis non of the estate of AARON EATON, deceased,

Appeller,

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

UNITED FUNERAL SYSTEM ASSOCIATION, a corporation, Appellant.

300 I.A. 608°

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Alonzo A. Pope, administrator de bonis non of the estate of of Aaron Eaton, deceased, brought suit in the Municipal court to recover \$250 upon a burial insurance policy issued to deceased.

Trial was had by the court without a jury, resulting in a finding and judgment for plaintiff. Defendant appeals.

Defendant, United Funeral System Association, is a burial insurance society, organized and doing business under the burial insurance laws of Illinois. July 24, 1933, it issued its policy of insurance in the sum of \$250 to Aaron Eaton, plaintiff's intestate, designating Nettie Baton, wife of the insured, as beneficiary. The beneficiary predeceased the insured, having died in December, 1936, and after her death deceased did not designate a new beneficiary. Eaton died December 29, 1936, and letters of administration de bonis non were issued July 27, 1937. This suit was instituted approximately sixteen months after the death of the insured.

The principal defenses interposed are that the provisions of the policy with reference to notice of death and the furnishing of proof of death, as provided by the bylaws, were not complied with. The circumstances relating to these issues, as disclosed by the abstract of record, indicate that the day following Eaton's death, his brother, Willard Eaton, together with one of plaintiff's counsel,

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Alongo . Pope, administrator <u>de logi pon</u> of the estato of of Laron Laton, decembed, brought buit in the Exaministral court to recover \$250 upon a burial insurance policy is used to research. Frial was had by the court without a jury, regulting in a finding and judgment for plainifif. Twiendent apenis,

Meronder, Chiter Tangral Bysten Bascon tion, is a burish insurance society, organized and could bustoes under the burish insurance lars of allenois. July 26, 1975, it issued its policy of insurance in the un of Leo to caron Bron, phoin iff's intertate, designating lettic onton, edge of the insured, us beneficiory. The beneficiery predeceased the insured, havin died in recember, 1936, and after her descaled did not designate a new beneficiery. Siatem died secember 29, 1836, and letters of administration designate non sere is ned July 27. This suit was instituted approximately sixtem months of the death of the insured.

The policy with reference to notice of leath and the froviolons of proof of death, as provided by the bylaws, were not complica with. The circumstances relating to there is ues, as disclosed by the abstract of record, indicate that the day follows and another, willerd atom, together sith one of plaintiffs counsel,

went to the office of the insurance company to make claim for the proceeds of the burial policy. Willard Maton testified that a Miss Cibson, in defendant's office, declined payment because the deceased "was sick at the time the last revival was made." but did not say anything about the filing of proofs of death, nor did she give Willard Maton or his attorney any blanks for the filing of proofs required by the by-laws. He also said that Miss Gibson made no point about notice of death. After Raton's death Willard also went to see the president of the defendant corporation and requested him to take charge of his brother's body. He was referred to Mr. Kersey, who was connected with the undertaking company, whose president was the same person as the president of defendant and had its office in the same building. When Maton asked Kersey what steps would be necessary in order to get the body buried, Kersey told him "the only thing you have to do is to give Mr. McGowan an order for the body."

Sydney P. Brown, one of the attorneys for plaintiff, who was examined by the court, corroborated Eaton's statements. He testified that when they went to the office of the insurance company nothing was said about proofs of death or blanks of any kind, and no blanks were tendered them. The burial company did demand the receipt book and the policy, and stated that the deceased was not in good health when the policy was reinstated, but no other objection was made to the payment of the claim.

It appears from the evidence that the receipt book and policy were in possession of the deceased's brother-in-law, who also claimed the body. The delay in bringing suit is partly accounted for by a controversy in the Probate court, where a citation against the brother-in-law of deceased was necessary ultimately to procure this receipt book and the policy.

By way of defense defendant relies principally upon the following provision of the policy: "Upon the death of a member immediate

nd to it is also to the most off it as easily off of them records of the burial policy. Illama a sect of the third things Miss wibson, in defendant! off Los, istlists onguest because the deceased "west sick at the time and lask mentral war made, but did not any any thing about the alling of proofs of acath, nor did gnilit est tot mumbe you yearotte wis to meta, atelli, evig ede of proofs required by the by-Laws. It also said arts land the of made no point characters after allow to ecises and surface on shom -la went to use the president to the wentert corpure the and requested him to lake sharge of his books to books as one today and to Mr. Kerney, who was cornected vith the undertains tomosay, whose problems was the same part on the great tent to we same and had its office in the Same bullwirg. her whom some dereny that steps would be necessary in end. I to you bery buried, Morsey ald him "the only thing you have to do in to give Mr. Motosen an order for the body."

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By way of defense defendant relies frincipally pen the fellowing provision of the policy: "Upon the death of a member immediate

notice shall be served upon the Association upon blanks which shall be furnished by the Association, and such notices will be sent to the office of the secretary at the Association's principal place of business or any of its recognized branches." The obvious purpose of this provision is to aid the undertaking firm, which was headed by the president of the defendant corporation, to secure the insured's body for burial. The insured died December 29, 1936, and on the following day oral notice of the intestate's death was given defendant's president, who informed Willard Eaton and his attorney that "the only thing you have to do is to give Mr. McGowan an order for the body." Pursuant to this direction, deceased's brother signed the blank given him which was dated December 30, 1936, addressed to the County Hopsital and read: "Kindly release remains of Aaron Maton to Kersey, McGowan & Morsell, 3515 Indiana Avenue. Respectfully, Willard A. Eaton, Brother, 6418 Vernon. Normal 6156." We think this oral notice to the defendant and the circumstances attending it were sufficient compliance with the provisions of the policy on the question of notice. In Traders Mutual Life Insurance Co. v. Johnson, 200 Ill. 359, 364, the court, under similar circumstances, said: "The company will be bound by acts of the president and secretary performed in its office, whether such acts are in writing or verbal, whether they make a contract, waive a forfeiture or give a consent." Moreover, the directions on the policy provide that "in the event of death of the insured the claimant should notify the Home Office at 3515 Indiana Avenue, Telephone Douglas 8285-8286, Chicago, Illinois, at once." It was evidently intended that for the guidance of the beneficiary a telephone call would be sufficient notice. It would logically follow that the oral notice given to the president by deceased's brother and his counsel, would likewise be sufficient.

The other ground urged for reversal is that the provisions of the bylaws with respect to filing proofs of death were not complied with, in that suit was instituted more than one year after proofs of

notice shall be served upon the store it is upon I that their be furnished by the useoclations one man regions illerand to the office of the governory at the relation to the relation business or any of its ricogniaed breashes. " His chricus purpose of this providion is to do the use of thing fight, thick we sould a the provident of the estaphene conjugate when, one case of the three of body for burdal. The insured clod washing it it, and on the -bushes ery oral coston the interpretate cost or fero yet unicolica and a provincent, the information of the most bin. The street along along "the only thing you have to do is to give ar, to done y order for the body. ' Turkulat to this direction, decomed: Letter tiged with the blank liven lim theon is A tod . downer 3., ited, consequent the doughty logaited to teed to the colored views of the deter to Kersey, Macoway and the AM and the verse, Concerning, illard . ..ton, setting 6.10 Terson. oracle 1 6." o .link the minnest communication of the bear of of colon face wint were pufficient compliance with the provintent of the policy on the question of rolles. In tracers auted the freezes of v. Johnson, 200 Ill. of8, 364, 86s sourt, under similar circumst moos, soids "The company will be bound by the of the practions and accretury performed in its office, the day with other or in thing or worked, hether in they make a contract, wrive a forf drard at give a consent." Moreover, the discoulant on the policy provide that the dw me of doath direct. Leaf of the following the district of bernari and to Indiana .. venue, felephone . ouglar 3835-1986, ohic o, Tlifpeit, at ence on it was oviered it to the the terminal of the bear of sidiary a salephone coll contains will be and notice. I make hercally folio, that the onel solice group to the pro-tions of decomparia bruther and rule countel, ould likewise us and letent.

the other ground urged for reversel is the provisions of the bylaws with respect to fillin, proofs of d. the are not complied with, in that oult as instituted mer. then one year floor peochs of

death were furnished. The policy contains the following provision: "Art. 18, Sec. 2. TIME TO SUE--No suit shall be maintained upon this Certificate at law or in equity unless said suit be instituted within one year after proofs of death shall have been furnished the Association." No specific time is designated for furnishing proofs of death. The proofs herein were ultimately supplied January 28, 1938, and suit was instituted April 22, 1938. The delay is unaccounted for in the record, but we find no provision in the bylaws which requires the administrator to furnish proofs within any specified time, and undoubtedly the lapse of more than a year before proofs of death were furnished may be explained in part by the controversy that arose in the Probate court, and also because of defendant's contention that deceased's ill health at the time the policy was reinstated constituted a defense to the suit. This is borne out by the fact that as late as July 5, 1938, defendant filed a petition for a subpoena duces tecum, setting forth that "in order for it to establish its defense in the above cause of action it will be necessary that the part of the records of the Pullman Porters' Benefit Association, having to do with the membership record of Aaron Maton, the deceased member, whose benefit certificate in defendant association is the basis of this suit, be subpoensed for use in evidence; that the said record from January 1, 1935, to the date of his death, will tend to disclose that shortly prior to the reinstatement said member was being treated by the company doctor, and at the time of said reinstatement representation was made that the said deceased member was in good health, free from any disease, all of which defense would be shown by the said record of said Pullman Porters' Benefit Association upon the production of records in response to the said subpoena duces tecum." It was not until July 13, 1938, and after the subpoena duces tecum had issued, that defendant actually raised the defense of no notice and lack of proofs of death.

After an examination of the record, we are satisfied that

death were furnished. The policy contains the following provisions nogu bogic ni m sd flude time ow-- We of Jat "Art. 18, Sec. 2. this Pertificate at law or in equity uples this built be instituted all beneficial pard swill limb disch to choose with they one minitia saccition." No specific time is design; ted for furniching proofs of death. The proofs bordh were alshmately cupiled Jonast 28, 1933, and sule was in a steel pril U., 1970. The blar is unscrounted for in the record, but it find no provision in the byles making requires the administrator a, furnish proofs within any appointed wine, and undoubtedly the lapse of more blan a year below or of a of tought eapth fadly aregonaged and volume in the definition of year bedalman's eres in the Probate court, and also because of ashequest's sequention dast become the interest of the came of the contract of the properties of the properties of the contract of the con a defense to the ouit. This is borns cut by the fact the en late an July 5, 1959, defendant files: polition for a subposma tures become Betting forth Jakt "in ouder for its to established to differ in the above cause of sotion it fill to moses my that the mort of one o gorde of the callman fortere! Boyent's .cold told on the vist to mericership record of eron into. In decessed rember, then benefit certificate in darandent assaudition is the basis of this autt. be submooned for use in avidance; that the said accord from January 1, 1935, to the cute of his inthi, will tend to dt place in herily prior to the reinstatement acts that ber being the ver being the capeny doctor, and to the time of eath but many representation on made that the said dreamed meanner was in good in all free from trut discuse, all or thich defense would be shown by the total record of anid fullmen Forters! Banelit Larachetian upon the production of the forter and taken the to the said subposma duces teams." It was not until July 13, 1993. and five the subports ducer tecom had is use, that defend nt consily raised the clarac of no rotice and lack of proufe of at the After an established of the record, ears established that

neither of the defenses interposed is meritorious. This was a policy of indemnity which should be construed in keeping with the agreement of the parties. (Forest City Ins. Co. v. Hardesty, 182 Ill. 39.) The defendant had no valid or meritorious defense and therefore the court properly entered judgment for plaintiff. The judgment of the Municipal court is accordingly affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., doncur.

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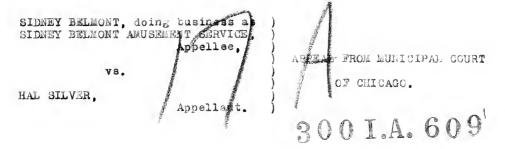
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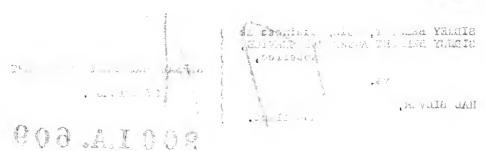


MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that defendant had breached a contract between the parties which provided that in such a case defendant should pay plaintiff \$350 as liquidated damages. Defendant filed an answer. Plaintiff moved for judgment on the pleadings, which was allowed by the court and judgment for \$350 was entered against defendant, from which he appeals. The question presented is whether the provision in the contract for liquidated damages should be construed as a penalty.

Plaintiff is a booking agent for actors and had a contract to book and direct a circus at St. Louis, No. Defendant is a tight wire performer. January 15, 1938, the parties made a written contract which provided, among other things: "In consideration of \$350 paid to The Artist, less ... Net as fees for managing and booking." The artist, the defendant, agreed to present his act for 14 days, commencing April 25, 1938, at the St. Louis circus. The agreement contained a number of rules and regulations concerning the conduct of defendant and provided that should defendant refuse or fail to play this engagement he would pay to plaintiff "as liquidated damages" \$350, the amount equal to defendant's salary.

Plaintiff's statement of claim alleged that the contract provided that defendant was not permitted to play any engagement for any person, corporation or partnership during the life of this contract, and that contrary to this provision, defendant was playing



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The artist, one definition, agreed to present his act for ladge, contained a number of rule: at the stable into the agreement contained a number of rule: and recalificate or certinate of fact and provided the stable of defendant and provided that another of rule and the stable of defendant and provided the salary play the salary.

Plaintiff's statement of claim alie, dilistathe contract provided that defendant was not parsitted to play and out a semition any person, corporation or paramership further the life of this contract, and that contrary to this provision, defendant was mlaying

an engagement for an amusement concern in Chicago for the period of time covered by the contract and has failed to appear and fulfill his engagement in accordance with the terms of the contract.

Defendant by his answer admitted the execution of the contract but alleged that he was excused from performing as he had not been paid the consideration mentioned in the contract or any part thereof, and that the St. Louis circus was conducted in violation of the rules of the American Federation of Actors, of which defendant was a member, and if under those circumstances defendant performed with the St. Louis circus he would be subject to fines and expulsion from the Federation.

The answer further asserted that the most plaintiff could receive in the event defendant gave his act was \$35, and therefore the provision for the payment of \$350 as liquidated damages is a penalty. In Advance Amusement Co. v. Franke, 263 Ill. 579, the court said:

"As was said by this court in Gobble v. Linder, 76 Ill.
157, no branch of the law is involved in more obscurity by contradictory decisions than whether a sum named in an agreement to secure performance will be treated as liquidated damages or a penalty, and as each case must depend upon its own peculiar and attendant circumstances, general rules of law on this question are often of little practical utility. While the intention of the parties on this question must be taken into consideration, the language of the contract is not conclusive. The courts of this State, as well as in other jurisdictions, lean towards a construction which excludes the idea of liquidated damages and permits the parties to recover only damages actually sustained."

That a stipulated sum will not be allowed as liquidated damages unless it may be fairly allowed as compensation for the breach, and that courts will look to see the nature and purpose of fixing the amount of damages to be paid, and if it appears to have been inserted to secure the prompt performance of the agreement it will be treated as a penalty and no more than actual damages can be recovered; and that in general, a sum of money in gross, to be paid for the non-performance of an agreement is considered as a

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penalty. This rule has been universally followed, the most recent case being <u>Pellegrini</u> v. <u>Bredenbeck</u>, No. 40330, opinion filed in this court April 10, 1939.

Applying this rule to the instant facts, we have no difficulty in arriving at the conclusion that the amount in question is to be considered as a penalty and not as liquidated damages. Here the defendant denied he had received any consideration for entering into the contract in question, and on motion for judgment on the pleadings this statement must be taken as true. Watt v. Cecil, 368 Ill. 510. It would be unconscionable to require defendant to pay his manager an amount equal to the whole salary defendant was to receive for the entire performances, and this would be especially true where defendant had not received any part of his salary.

In his statement of claim plaintiff did not seek to recover for actual damages sustained but sought only to recover the full amount mentioned in the contract as liquidated damages. We are of the opinion that, construing the contract in the light of all the circumstances, plaintiff cannot recover this amount as liquidated damages, and the judgment against defendant is reversed.

REVERSED.

Matchett and O'Connor, JJ., concur.

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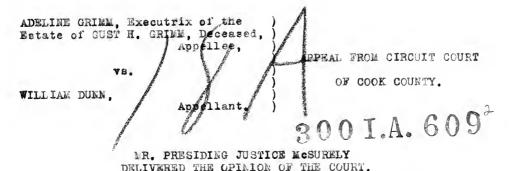
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This is an appeal from a judgment of \$750 entered upon the verdict of a jury in an action seeking to recover damages caused by an automobile accident.

Gust H. Grimm originally filed his complaint seeking damages for injuries suffered by him because of defendant's alleged negligent operation of his automobile; about a year thereafter and while the suit was pending Grimm died from causes not related to the automobile accident; his widow, Adeline Grimm, filed her petition as executrix of the estate of Gust H. Grimm, asserting that she was continuing the suit as executrix of the estate and that the only damages sought were for the injuries to Grimm, his necessary expenses and property damage to his automobile, with loss of earnings and pain and suffering.

Defendant in this court apparently makes the point that because plaintiff failed to allege that Grimm came to his death from other causes than the accident, there was no cause of action stated. The argument is not clear, but it is sufficient to say that the action was brought for personal injuries, as appears from the amended complaint. Moreover, at the conclusion of plaintiff's case defendant moved for a directed verdict, but the alleged insufficiency of the pleadings was not then raised. This was also true when defendant repeated his motion at the conclusion of defendant's case.

When defendant filed a motion for a new trial, the objection

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that the complaint failed to aver that Gust Grimm did not die as the result of the accident was for the first time made. The court on plaintiff's motion permitted her to file an amended complaint to conform to the proof, in accordance with sec. 46 of the Civil Practice Act. The testimony having showed that Gust H. Grimm died from other causes than the injuries received in the accident, the amended complaint was duly filed and defendant's motion for a new trial was denied. In Wetherell v. Chicago City R. Co., 104 Ill. App. 357, 361, it was held that under such circumstances the only necessary change in the declaration is the substitution of the representative of the deceased party as plaintiff. And in Prouty v. City of Chicago, 250 Ill., 222, it was held that when one suffers an injury as a consequence of the negligent act of another. he has a right of action. Which existed at common law, for the resulting damages. If he dies from some other cause than the injury the action for the injury survives to his personal representative. Here the cause of action is not based on the death of Grimm. Moreover, under the Practice Act, section 42, all defects in pleadings. either in form or substance, not objected to in the trial court, shall be deemed to be waived.

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Defendant argues that Grimm was guilty of contributory negligence. The accident happened on Mannheim Road in Chicago, opposite the entrance to St. John's cemetery, which lies east of the Road; both cars were headed southward; with Mr. Grimm in the Ford car driven by him were his son and two other young men; it was about 7:30 o'clock in the morning; no one was with defendant in his car, which was slightly ahead of Grimm's car. Elmer Grimm, the son, testified that as they started to pass defendant's car it swung to the east toward the cemetery entrance; the cars collided at the cemetery gate; the horn of Grimm's car was blown while he was 100 feet back of defendant's car; Grimm received injuries to his wrist and arm.

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The other two occupants of Grimm's car gave substantially the same testimony.

The question of centributory negligence on the part of Grimm was properly left to the jury, and it cannot be said that the verdict is manifestly against the weight of the evidence. On the other hand there was evidence that as Grimm's car was almost up to defendant's car defendant, without warning, swung his car directly in the path of the other. The issues of negligence of defendant and contributory negligence of Grimm were properly submitted to the jury and we see no reason to disagree with the verdict.

The brief for defendant has not followed Rule 7 of this court, thereby adding to the difficulty of understanding the points made.

The verdict was justified by the evidence, and as no reversible errors occurred upon the trial the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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RALPH C. SULLIVAN, Executor of the Estate of Mary O'Neil, Decessed, Appellant,

VS.

ARTHUR CULP, JAMES SHISHEM, HAROLD (EISENBERG and LYLISS EISENBERG, Appellees. appeal FROM MUNICIPAL COURT OF CHICAGO.

300 I.A. 609

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit on bonds given in a forcible detainer action brought against Arthur Culp, one of the instant defendants; judgment was against Culp in that suit, which was affirmed in this court. (260 Ill. App. 443.) Upon trial by the court of this suit on the bonds judgment was against plaintiff, who appeals.

The forcible detainer action was to recover possession of the first floor apartment and garage at 4417 West Monroe street, Chicago. In our opinion in the forcible detainer case we recited somewhat in detail the facts, which will not be repeated here. On the appeal in that case two bonds were given, one signed by defendant James Shishem, and when plaintiff objected to this as insufficient an additional bond was given signed by defendants Harold Eisenberg and Lyliss Eisenberg.

Culp went into possession of the premises under an agreement to buy them; subsequently the owner advised Culp that a clear title to the premises could not be given, as one of the mortgagees holding a mortgage on the premises had instituted foreclosure proceedings; both the plaintiff in the forcible detainer proceedings and Culp, the defendant, were made defendants in the foreclosure proceedings, and it was decreed that out of the proceeds of the sale Culp should be paid \$2600, \$1000 of which was the amount he paid on the contract of sale, and \$1600, the amount he had expended on repairs on the

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premises.

sustained by the court, was that the parties had settled all the matters in issue between them. Three witnesses testified on behalf of the defendant to this settlement. They testified that after the opinion was rendered in this court in the forcible detainer suit. Shishem, Culp, Mrs. Culp and David S. Horwich, attorney for Arthur Culp, went to the office of Arthur W. Kettles, plaintiff's attorney, and after computing the liability of Culp to plaintiff, paid Kettles \$500 in full settlement and received a receipt therefor. The credibility of the testimony concerning this transaction is strongly attacked by counsel for plaintiff.

David S. Horwich, an attorney practicing at this Bar, testified that he had represented Culp in the forcible detainer proceedings in the Municipal court and also in this court; that subsequent to the opinion of this court he had numerous telephone conversations with Arthur W. Kettles, attorney for plaintiff; that in the summer of 1931 Shishem, Culp, Mrs. Culp, and the witness Horwich went to the office of Kettles and discussed the exact amount for which Culp would be liable by reason of the confirmation by the Appellate court of the judgment in the forcible detainer suit. The witness gave in substance the conversation with Kettles - that it was agreed that Culp should pay \$500 in full settlement of all obligations; that this was done and Kettles gave a receipt for this to Culp; Horwich told Kettles he was leaving town and asked Kettles to prepare a satisfaction piece of the judgment and file it, and Kettles promised to do this. Shishem testified substantially to the same effect; that Culp paid the money to Kettles and received a receipt: that "everybody shook hands and we went out, "

Mrs. Culp testified that she was present at this meeting and that Kettles said it would take about \$500 to clear up everything:

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that Culp paid Kettles this amount, receiving a receipt which Kettles said would release any obligation on the bonds. Ars. Culp also testified that she had not been living with her husband for three years and did not know where he was.

Kettles, a brother-in-law of plaintiff Sullivan, denies that any such transaction took place, saying there was never any discussion with reference to settlement of the case. Kettles stated on direct examination that he had been disbarred in January, 1937. In In re Kettles, 365 Ill. 168, the order of disbarment may be found. The ground for this was the appropriation to his own use of money belonging to a client.

Although according to Horwich and the others the money was paid by Culp to Kettles in the summer of 1931, plaintiff made no demand upon defendants for settlement of their obligations on the bonds and did not bring suit thereon until more than seven years had elapsed after the cause of action accrued and about six and a half years after the money was paid to Kettles as claimed. This delay in making any demand upon defendants raises a strong presumption that the money was paid as narrated by defendants.

Counsel for plaintiff contend that the testimony of the settlement is unbelievable, as plaintiff never would have accepted \$500 in settlement of a claim of over \$4000. This includes the rental of the second floor of the premises in question, but the forcible detainer action was for possession of the first floor and garage only, and the appeal bonds were conditioned upon the payment of rent due or that may become due by reason of the withholding of "the premises in controversy." They did not authorize the assessment of damages for withholding any other premises.

Plaintiff's counsel argue that Kettles was without authority to accept less than the amount due plaintiff in satisfaction of plaintiff's claim; that the condition of the bond was that, if

that Gulp paid Sottlet this autumi, receiving a receipt which Rettles said sould release any obligation on the cause. The cutp also testified the sale has not been that the receipt anchord for three years and id not and above he was.

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Coursel for plaintiff contend that the testimony of the settlement is unbelievable, as plaintiff rever outd have soceoted \$500 in settlement of a craim of over plant. This includes the rental of the second floor of the pre ises in quastion, but the forcible detainer action was for possession of the first floor and garage only, and the appeal buds ware conditioned upon the parent of rent due or that pay become sue by reason of the citanolding of the premises in controversy. They id not all oring the dashearent of damages for witholding any other premises.

Plaintiff's counsel argue that destine was difficut authority to accept less than the amount due plaintiff in extisfaction of plaintiff's claim; that the condition of the bond was that, if

defendant should fail in his appeal in the forcible detainer suit, the principal and sureties would "pay all rent due or that may become due before the final determination of this suit"; that all the rent due under this provision at the time of the alleged settlement was \$2480, and that Kettles had no authority to accept less than this amount as a compromise.

Horwich testified that at this meeting in the office of Kettles, "we discussed with him the exact amount for which oulp would be liable by reason of the confirmation of the Appellate court of the judgment by confession entered by the Municipal court": that, "Mr. Kettles said to me, 'Horwich, now much had you figured we have got coming?' I said, 'According to my conception of the law we would be liable to you for rent from April, 1930. until the date that Mrs. Culp received the master's deed, which I think was in December of 1930 11; that the rent was figured on the basis of approximately \$60 a month for 8 months, which made \$480. In addition there were court costs, which ran the figure up to \$500. Horwich further testified that in making this payment. "I did not consider that I was paying him more or less than he was justly entitled to. I did not consider that we were paying him anything in excess. I felt that my client, having lost the case in the Appellate court, should have paid rent for those 8 months at \$60 a month from the time the suit was started until the time that she received the master's deed. That was 8 months at \$60, \$10 court costs and \$3 court costs. I agreed to give nim the exact amount he wanted."

This was not a case of compromise or payment of a less sum than the respective attorneys believed was due. Indeed, in this court counsel for defendants argue that there is only a total liability of \$395 and that the payment to Kettles was excessive.

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However this may be, the testimony of Horwich is definite to the effect that there was no understanding between him and kettles that less than the amount due was paid. Usually an attorney is empowered to receive his client's money. Ruckman v. Alwood, 44 Ill. 183; Custer v. Agnew, 83 Ill., 194; Allinson v. Pierson, 285 Ill. 387.

The trial court in weighing the evidence commented upon the fact that the only witness denying the settlement testified to by Horwich and others was kettles, the disbarred attorney, who had represented plaintiff in all the litigation concerning the property. He also commented upon the long period of time which elapsed before any demand was made upon defendants.

It has been settled by very many decisions that the finding of the trial judge, who tries a case without a jury and hears and observes the witnesses, should not be disturbed unless his conclusion is manifestly against the weight of the evidence. City of Quincy v. Kemper, 304 Ill. 303, 307, and many other cases.

Applying this rule, we are of the opinion that we would not be justified in concluding that the trial Judge should not have accepted the testimony presented by defendants showing a settlement.

As we see no convincing reason to disturb the judgment, it is affirmed,

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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As we see no constanting remains a lateral rule janguars, it is affirmed.

all Filter.

Matchett and O'Connor, JJ., concur.

THE PEOPLE OF THE STATE OF ILLIAOIS.

Defendant in Error,

VS.

PATRICK J. BILLINGS

ERACR TO CRIMINAL COURT OF COOK COUNTY.

0 I.A. 609

PRESIDING JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Defendant, with Rose Marie Gennarelli, was charged with conspiracy to cheat and defraud certain parties and to embezzle and convert to their own use certain interest coupons and divers checks. Rose Marie Gennarelli was allowed a separate trial and testified on behalf of the State in the instant case; a jury found defendant Billings guilty and fixed his punishment at imprisonment in the pemitentiary and a fine of \$1000; he has sued out this writ of error. seeking a reversal of the judgment.

Miss Gennarelli testified that she was 28 years of age and had been in the employ of the Securities Service Corporation; her duties were to handle bonds of the Book-Cadillac Hotel properties, which was under reorganization: that she met Billings at a ballroom in April, 1936, and thereafter saw him about three nights a week; that thereafter Billings received from her cash and numerous checks and money orders which she had stolen from her employers at def'endant Billings' request.

Del'endant first makes the point that the State failed to prove del'endant guilty of a conspiracy; that Miss Gennarelli testified that she did not do the things charged in the indictment by agreement with defendant, but under coercion or threat by him. is admitted that she stole and embezzled the funds in question and that the defendant received and converted them to his own use.

Miss Gennarelli testified that the defendant asked her to cash some coupons belonging to her employer and give the proceeds

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PATRICE J. BILLINGS, /

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Defendant guilty of a calcyiracy; that his sendar-asi testified that say did not do the toings calarged is the indicteant by
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that the defendant received and canter of the finds over use.

hiss Cennarelli testifice that he defendent arser her to cash some coupons belonging to ner employer and give the proceeds

to him, premising to pay it back; that the following day she extracted some interest coupons belonging to her employer, sent them to the bank by a messenger boy, who cashed them and turned over the proceeds, \$100, to her; that the same evening she gave this to defendant, and he inquired, "Did anybody notice anything?" that she replied, "No"; that he said "It was easy, wasn't it?" Two days later she again saw defendant, who told her to get some more money from the office; on her replying that she did not want to do that any more defendant said he had a lot of money and could pay it back, and "Whatever you are doing is for both of us, and you will never be sorry as I will take the blame if anything comes up down at the office"; that thereafter she continued her peculations almost every week, giving the money to defendant; that when defendant went to Hollywood, California, she purchased with the cash proceeds of stolen coupons American Express money orders payable to defendant, which he received and used; that she was afterward employed by S. W. Strauss & Co., where Mr. M. C. Kuchn was manager of the bond department and she was under his supervision: that she used to lay a bunch of checks on his desk for signature. and he would sign and return them to her: that through this means she obtained some seven checks signed by Mr. Kuehn, each payable to defendant in amounts ranging from \$220 to \$420; that she mailed these checks to the defendant. Miss Gennarelli testified this was done "not as a result of any agreement"; that she gave defendant this money because she was afraid of him.

Defendant testified that Miss Gennarelli told him that she had been in an accident and had received a large sum of money. She denied making any such statement. Defendant repeatedly testified that he did not make any demands on Miss Gennarelli and did not threaten to expose her and did not in anywise threaten her; that he did not know the money she gave him was stolen.

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Defendant cites cases defining conspiracy as a combination of two or more persons to accompaish by some concerted action some criminal or unlawful purpose. Tribune Co. v. Thompson, 342 III.

503, and also cites cases where there was no proof of any concerted action or agreement therefor, but merely a passive cognizance of the wrongful act. It is argued that the embezzlements were not the result of any agreement between defendant and Miss Gennarelli, but that she was forced to do the wrongful acts because of threats made by him. The evidence does not support this defense. She was very much in love with defendant and did as he requested because of this unfortunate infatuation. She expected to be married to him, and this was a moving factor in her actions.

People enter into agreements through a variety of motives. One party to an agreement may be moved thereto by one motive and the other party by an entirely different motive, but the agreement to do a wrong thing through joint action comes within the legal definition of a conspiracy to do an unlawful act. The evidence here supported the charge of conspiracy.

objections to the testimony of Mrs. Gene Charters concerning a certain telephonic conversation between defendant and Miss Gennarelli. Mrs. Charters testified that she was an experienced court reporter of the Criminal court of Cook county; that she was employed to report a telephonic conversation; that she dialed the telephone number of Miss Gennarelli, a woman's voice responded, and she then transcribed a conversation which took place over the telephone between defendant, who was sitting in an adjoining room, and the woman at the other end of the telephone line; she was asked if she could identify this woman's voice and, although repeatedly questioned about this, said she could not identify it as the voice of Miss Gennarelli; thereupon, upon motion the trial court sustained objections to her reading from her shorthand notes this conversa-

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tion, and the record indicates that defendant's counsel abandoned the attempt to impeach MissGennarelli by the testimony of Frs. Charters. No offer was made as to what the witness would testify. Subsequently, however, the court did permit the testimony of defendant concerning this alleged conversation. Miss Gennarelli denied having any conversation with defendant at the time stated by Mrs. Charters and told in some detail of her presence elsewhere than at her home at the time mentioned by Mrs. Charters.

Severe criticism is made by defendant's counsel of the conduct of the trial Judge. We regret to say that the trial court rather encouraged frivolity on the part of the attorneys both for the State and for the defendant. The court referred more than once to the well known vantriloquist's dummy, "Charlie &cCarthy," probably to the assument of the jurors and others in the court room; but these remarks were at the expense of the attorney for the State, and could not have been prejudicial to defendant.

Also, there were useless and undignified remarks made by the assistant State's attorney and, to a certain extent, by counsel for defendant. It would be useless to extend this opinion by marrating all the objectionable statements and comments made by the court and the respective counsel in the case.

It is seemingly recognized as proper practice for a defense counsel to impart an air of lightness or frivolity to the trial of a criminal charge; to cause a case to be "laughed out of court" is generally recognized as favorable to a defendant. While we deplore the manner in which the present case was tried, we cannot say that it was so prejudicial to the defendant as to justify a reversal.

Police officer Dobert was asked whether he knew the reputation of the defendant for truth and veracity, to which he replied, "Bad." He was then asked, "Would you believe him under oath?" and his answer was, "I wouldn't." The point is made that there was no

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showing that this reputation was based on a general reputation of the defendant in the neighborhood where he resided or did business, nor of any particular time, citing The People v. Willy, 301 Ill.

307, and The People v. Lehner, 326 Ill. 216. These cases hold, in substance, that an opinion as to the reputation of a defendant must not rest on isolated instances but upon the general reputation. The question was objectionable, but the answer supplied the necessary facts. Officer Dobert testified that he had known defendant for about eight years; that he knew his reputation from police officers and also from certain citizens whose names he gave. The criticism of his testimony properly goes more to the weight to be given it than to its competency. The People v.

Hicks, 362 Ill. 238.

Defendant contends that the court's instructions to the jury were confusing and not applicable to the facts. The objections for the most part are technical and not of sufficient importance to require a reversal. They for the most part state the general rule as to the crime of conspiracy. We see no reversible error with reference to these instructions.

We hold that, while we deprecate the manner in which the case was tried, yet, in view of the convincing character of the evidence presented as to the guilt of defendant, the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

showing that this requestion was based on a general reputation of the defendant if the neighborneed where he relied on and analyment of any particular and structured the feeple y. **ing. 307, and **ing. **eeple y. **ing. **ing

Defendant contents of the routh bitatrouchurs to the just policions of the jury were confusing and not optioned to the just one of the most part are record at the most part are record at the most part are reversed. The low of the orime of consolrange. We see no reversible error with reference to these in this classes.

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Matchett sud t 'tonnor, 22., concur.

UNITED STATES GYPSUM COMPANY, a Corporation,

VS.

THOMAS D. RANDALL, CHICAGO SANITARIUM, a Corporation, et al.

ECONOMY PLUMBING & MEATING COMPANY, Inc., a Corporation, and JOE KOMIUSKY and CHARLES HOSS, doing business as Economy Plumbing & Heating Company, Appellants,

VS.

JOHANNA HABENICHT.

Appellee,

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

300 I.A. 610

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Economy Plumbing & Heating Company, Inc., a corporation, and Joe Kominsky and Charles Ross, doing business as Economy Plumbing & Heating Company, seek to reverse that part of a decree entered by the Circuit court of Cook county denying their claim of \$19,160 for a mechanic's lien and dismissing their intervening petitions for want of equity.

August 1, 1929, Dr. Alexander Magnus was president, principal stockholder and the active head of the Chicago Sanitarium, Inc., which operated a private hospital for mental patients at 29th street and Prairie avenue, Chicago. The hospital was located on lots 47, 48 and 49; the adjoining lots, 50, 51 and 52, were unimproved and then owned by Dr. Magnus; he conveyed the lots to the Sanitarium.

Mrs. Johanna Habenicht, who is defending that portion of the decree appealed from, was a stockholder and a director in the sanitarium and the mother-in-law of Dr. Magnus.

August 1, 1929, Magnus and the Sanitarium entered into a contract with Thomas D. Randall and Harold Vagtborg, doing business as Randall and Vagtborg, for the construction of a new hospital building

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UNITED STATES CYPSUS CLAPARY, a Corporation.

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ER. JUSTICE C'obeach Dallvale, Fin CPT: Ton OF THE COURT.

By this empeal the Scenery Planeing a Nectine Scopery, inc., a corporation, and for hostisky and Charles Ross, folia, business as Beenemy Plumbing a neeting seasonly, onek to reverse that part of a decree entered by the Sirenit court of dook county denying their claim of \$19,150 for a sec., ic's lier and irmissing their interventng petitions for with of equity.

August 1, 1929, Br. Lemmber angula was president, principal stockholder and the seties and of the Chicago Banit rium, 10., which operated a private hored all for Lont a patients at fata street and Prairie wome, Uniongo. The nospical was lemated and lots 47, 48 and 49; the edjoining lots, b., 51 and 52, were uni proved and then owned by Dr. tagnas; he conveyed are lots to the sanitarium.

Mrs. Johanna Amberiaht, who is designain, and portion of the secree appealed from, was a stockholder and a lighter in the remitarium and the mother-in-law of Dr. Lagnus.

August 1, 1926, agner and the carritarium entered into a contract with Thomas D. Aandall and darrolf Vagtborg, doing usiness as Handall and Vagtborg, for the construction of a new nospital building

on lots 50, 51 and 52. Afterward Randall and Vagtborg entered into a number of sub-contracts for the construction of the hospital, two of which were with the Economy Plumbing & Heating company, whereby the latter agreed to install plumbing and swwerage for \$13,200 and the heating system for \$8,800, or a total of \$22,000; this work was done to the satisfaction of all, and the Economy company in addition did extra work for which it is agreed it was to be paid \$1160; the work was completed July 23, 1930, and for it the Economy company was to be paid \$23,160; it has received but \$4,000, leaving a balance of \$19,160.

It appears that almost from the beginning of the construction of the hospital, building the Sanitarium was in financial difficulties and from that time a number of plans were proposed to raise money to pay for the hospital building but none of them was successful, so that a great many claims for work done and material furnished are still due and unpaid. The Sanitarium and Dr. Magnus have since gone through bankruptcy.

April 15, 1930, the U. S. Gypsum Co. filed its petition fora mechanic's lien in the Circuit court of Cook county and on August 19, 1930, the Economy company filed its intervening petition in that proceeding to fereclose its mechanic's lien for \$19,160; it alleged that on August 13, 1930, it served its notice for mechanic's lien on the owners of the property.

Some time afterward a committee representing creditors who had furnished labor and material on the building was formed. On June 28, 1933, more than three years after the Circuit court proceeding was instituted, the committee filed its bill in the Superior court to foreclose a bond issue of \$50,000, the bonds being dated June 15, 1930; it appears there was but \$12,503.15 due under the bond issue. Afterward Mrs. Habenicht filed her cross bill in the Superior court suit to foreclose a trust deed on the south half of lot 50 and lots

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51 and 52. It is alleged the trust deed was given to secure an indebtedness of Dr. Magnus incurred June 29, 1928, for \$20,000. exidenced by two principal notes, one for \$5,000 and one for \$15,000, with interest at 6%; that these notes were due on or before October 1, 1928, and that they were given for a portion of the unpaid purchase price. In the meantime Joe Kominsky and Charles Ross, who had been doing business as partners under the name of Economy Plumbing & Heating Company, caused a corporation, the Economy Plumbing & Heating Company, Inc., to be organized to continue the business. This corporation filed its answer in the nature of an intervening petition in the Superior court case. A number of other parties filed claims for mechanic's liens in the two cases, the Circuit court case was referred to a master of that court and the Superior court case to a master of the latter court. After some evidence had been taken orders were entered transferring the Superior court case to the Circuit court and the causes were consolidated and disposed of as one case, but one decree being entered.

A number of mechanic's lien claims were allowed and a number of others disallowed. The question of the priority of some of them was by the decree reserved for future consideration.

While not important in this case, yet we think we ought to say that the decree, which consists of 89 typewritten pages in the record, might have been much shortened if the provisions of paragraph 3, section 64 of the Civil Practice act had been followed. The record (pleadings, evidence, exhibits, master's report and decree) is voluminous.

The master in his report recommended the disallowance of the Economy Company's claim both as a partnership and as a corporation and gave a number of reasons therefor. They were incorporated in the decree and we shall consider them.

51 and 52. It is will competition dead as iv it to recove an indebtodness of m. as i curred date ds, i.f. ijr [Suff.]. exidenced by two principles nouns, the fire party on the for and the second of the second o fore Untober 1, 1985, by the bush shop they give four a pir ing at the unpaid porchast orice. Little too neineky and Charles hose, who we want of a contess is part on mater the name of acunamy rlambing a season supposely, coasted supportation, the Aconomy Pluming which the bolder, the be or waised to continue the outiness. This corporation file; its answer is the nature of an intervening methodon in the superior court case. A number of other parallel of the tor the control of the sale of the total two cases, the Circuit court case as referred to a sesten of trust court and the buperior court case to a later or the latter court. After some evidence had seen baden baders are about ad trabificating the Superior court case to the circuit court and the causes were consolidated and disposed of as one case, but one decree coing entered.

A number of rectaile's item cash a were allo er and a number of others disclosed, the casting of a.e.ri rity of them was by the decree reserved for farme a moistration.

While not important in this case, yet we take equal to say that the decrea, which consists of a theoremiation and the arrithm of the confined of the arrithm of the decreasing of paragraph of the divil aractice act and total followed. The record (pleadings, evinewed, equalities, eacher's report and decree) is voluminous.

The master is described the disallowance of the Rechory Company's that both as a partier of and as a comporation and gave a number of reasons therefor. They were incorporated in the decree and we shall consider them.

The master found that the Economy company on October 16, 1930. waived all claims for liens by executing a written waiver. The written waiver is in the record and is in the usual form. It recites that in consideration of \$15,304 the Ecomony company waives its right of lien, and that the balance due on Economy company's contract is \$3900. The evidence shows that the \$15,304 was paid by delivering debenture bonds for that amount to the Economy company: that no part of these debentures has ever been paid; that the debentures were executed pursuant to a proposed agreement to be entered into by all the creditors of the Sanitarium; that the waiver was delivered by the Economy company to Victor P. Frank, one of the parties to the proposed agreement for settlement of all the claims against the Sanitarium, with the understanding that the waiver was not to be delivered to the owners of the property unless and until the deal was consummated, and that a considerable time after the delivery of the written waiver Frank, through mistake, delivered it to the owners of the property. The evidence further shows that a number of creditors refused to become parties to the settlement agreement.

The waiver, having been conditionally delivered and the condition never having been performed, was not binding on the Economy company, and its claim for lien was not waived. We think the finding of the master and the chancellor is against the evidence.

The master also found, as did the decree, that the Economy company waived its claim for lien by becoming a party to an agreement of February 27, 1931, whereby it agreed not to institute any mechanic's lien or other proceeding to enforce its claim for lien. The written agreement was drawn up in an endeavor to settle all the sub-contractors' claims against the property. The Sanitarium, Dr. Magnus, Vagtborg and Ross, who were designated in the contract as the committee, and Central Manufacturing District Bank signed the agreement, and it was also to

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The marker via found, or differ fourty to the footent company waived its of the first one in the vertent of February 37, 1931, thereby it a read not. Itsticted any sachante's lien or other proceeding to enforce its obside for him. The appropriate agreement was drawn as in an endower to rettle all the cub-retinations olding against the property. The sacherium, or, while with the property. The sacherium, or, while, "and the property and designated in the contract as the condition, and the sacherium and the sacherium of the condition, and the sacherium and designated in the contract as the condition, and the sachering district hank signed the sachering of the sachering district hank signed the sachers.

be signed by the creditors.

The evidence shows that by a former agreement the Sanitarium agreed to pay 35% to the creditors in cash, which had not been done; that it had been unable to pay for the construction of the building. and that it agreed to turn over the hospital/the committe to be operated, etc., the income to be distributed to the creditors: that upon demand by the committee the creditors were to dismiss all proceedings to enforce their liens them pending. Some of the creditors. including the Economy company, signed the agreement; the Economy company showed the amount of its claim to be \$2800; several refused to sign; the matter fell through, all efforts to refinance the Sanitarium failed and it was adjudged a bankrupt Rovember 9, 1933; Dr. Magnus was also adjudged a bankrupt November 1, 1933. Some of the claimants, including the Economy company, proceeded to prove up their claims in the proceedings in which they filed their intervening petition. Under the facts as disclosed by the evidence, we think the proposed agreement of February 27, 1931, was never carried out and that the Economy company did not waive its claim for lien by signing it.

a proper notice of lien upon the owner. The notice was dated August 14, 1930, within a month after the last work done by the Economy company; it was addressed to the Sanitarium, Dr. Magnus and Thomas D. Randall, one of the original contractors; it stated that the Economy company, a corporation, had been "employed by Thomas D. Randall to furnish plumbing, sewerage and heating", and the master found the notice was insufficient because Thomas D. Randall was not the original contractor, but that Thomas D. Randall and Harold Vagtborg, doing business as Randall and Vagtborg, were the original contractors. The two contracts made by the Economy company were signed by Thomas D. Randall, whereas the general contractor was the partnership of

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Randall and Vagtborg. We think this objection is hypercritical and without merit. United Cork Companies v. Volland, 365 Ill. 564. Moreover, no notice was required for the reason that Randall and Vagtborg delivered to the owners, Dr. Magnus and the Sanitarium, a sworn statement in accordance with section 5 of the Mechanic's Lien Act, which showed the Economy company to be one of the sutcontractors and the amount of its contract to be \$22,204.

The master also found, as did the decree, that the Economy company's claim for lien should not be allowed because the claim was then being prosecuted by the Economy company, a corporation organized on August 4, 1930, and that its claim was based on an assignment of the claim by Kominsky and Ross doing business as the Economy Plumbing & Heating Company, a partnership alleged to have been formed on August 5, 1930; that the notice of claim for lien was served August 14, 1930, in the name of the corporation, while the answer in the nature of an intervening petition claiming a lien, was filed by the partnership August 19, 1930; that on that day the claim was owned by the corporation and should have been filed by it. We think this finding is exceedingly refined and in a degree hypercritical and altogether unwarranted.

The original petition of the Economy company for a lien was filed August 19, 1930; its work was completed July 23, 1930. The Economy company, a corporation, filed an amended petition by leave of court May 25, 1937, showing it was the assignee of the Economy company, a partnership; in all other respects the original and amended petitions were identical. We think the amended petition cured the technical defect and related back to the time of the filing of the original intervening petition, and that the finding of the master and the decree that the Economy company, a corporation, did not file its claim within the statutory period is without merit.

In United Cork Companies v. Volland, 365 Ill. 564, a proceed-

Randall and Vagthorg. We think to is objective is nye remittional and without sends. Labers tone comparise v. object, 360 111. 564. Moreover, no notice was relatived for the relative v. of the should and Vagthorg delivered at the uncertainty. The agence of the sandt rium, a sworm statement in theoretice to its sention for the sechenists. Lien Act, which showed the Sepanomy of the its first of the sub-contractors and the lound of the sections of the Sechenists.

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In United Cork Companies v. Volland, 365 111. 564, a proceed-

ing to enforce a mechanic's lien, in reply to the contention that the statute providing for a mechanic's lien must be stricyly construed, the court said (p. 372): "The doctrine of strict construction was never meant to be applied as a pitfall to the unwary, in good faith pursuing the path marked by the statute, nor as an ambuscade from which an adversary can overwhelm him for an immaterial misstep. Its function is to preserve the substantial rights of those against whom the remedy offered by the statute is directed." The court then refers to sections 7 and 9 of the Act and continuing said: "These provisions of the statute disclose a manifest legislative intent to remove, as far as practicable, technical requirements as a material element of the right to enforce a valid lien, and to clarify questions touching the materiality of the steps prescribed by the statute. A salient provision is that no lien shall be defeated because of unintentional error."

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Upon a consideration of the entire record it appears that the Economy company performed its two contracts to the satisfaction of everyone; that there is still due and unpaid to it \$19,160; that all the several plans for the settlement of all the claims of creditors of the Sanitarium fell through, and that the propositions mentioned in each of them are not binding on the Economy company. It is true it has received \$15,304 debentures, and although they are worthless and were worthless all the time they should be returned, as the Economy company has offered to do.

We hold that the Economy company is entitled to a mechanic's lien, and accordingly that part of the decree of the Circuit court of Cook county appealed from is reversed and the matter remanded with directions to allow the Economy Company's claim.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

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the statute providing for a mechanic's lian must be stricyly construed, the court sold (p. 172): "The doctring of strice construction was never meant to be applied to a pittall to the lawary, in
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REVERSED AND MEMARIED STRA DERECTIONS.

Modurely, P. J., and amtehett, J., concar,

WILMA E. KINNEY,

Appellant,

APPEAL FROM SUPERIOR COURT

VS.

PHILIP C. LINDGREN et al.

300 I.A. 610

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This case has already been before us, and in an opinion rendered June 13, 1938, we reversed the decree and remanded the cause. (296 Ill. App. 635.) When the case was remanded plaintiff moved to redocket it and asked for a new trial; the court, after examining our opinion, held in effect that it decided all the issues in the case against the plaintiff and denied the motion to redocket and for a new trial, and entered a decree approving the trustees' account and dismissing plaintiff's complaint as to certain defendants.

Without repeating all the facts as stated in our former opinion, it is enough to say that plaintiff filed a complaint asking for an accounting against the defendants, as trustees under a trust agreement dated January 13, 1922, which trust was created by plaintiff's mother; the complaint alleged that at the time of the execution of the trust agreement her mother turned over to the two trustees certain mortgage bonds; that from time to time the moneys invested in these bonds were reinvested by the trustees and that this continued for many years; that plaintiff's mother died July 2, 1924, and plaintiff became 21 years of age November 23, 1935. The complaint in substance charged that the two trustees, Fred P. Heitman and Philip C. Lindgren, in flagrant violation of the trust. purchased bonds i'rom the Heitman Trust Company, a corporation in which they were the principal officers, well knowing that the bonds were worth considerable less than the face value at the time of their purchase, and that the trustees have charged the estate the

"ILL. S. HICLST, Appellant,

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PHILLIP U. LINJUKUL et Ll. Appliaecr.

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Life observes already less before as, no in an opinion rendered date is, 1933, we have the isores and rendered the cause. (296 life, Apo. 135.) Her the order as remanded plaintiff moved to redocate it the least for a devirial; the court, after exact ing our opinion, held in effect that it decided all the issues in the case against the old instiff and and the action to redocate and or a new trial, and entire the approving the trustees! account and disalesing our mobility somplaint as to certain definitants.

Without repeating all the feets as another in our former opinton, is te endu. To easy that of intiff filed a complaint asking for an accounting whites and defind a to, as trustees under a trust ugreament dated January 1., 1922, wilcon trust was created by plaintiff a sot er; on complete was sureger that if third of the execution of ine truet spreament her mother turned over to the two trustees certain acreanse londs; the from time to time the moneys invested in whese bonds were reinvested in the trustees and that tite continual for many years; and plaintiffes not or died buly 2, 1924, and partially became 21 years of age hoverbor 23, 1935. The complaint in sub- unite ciary - bust to two trusters, who a P. Heitman and Pailip o. binagren, is figgret viol von of the trust, purchased loads from the leither livest Company, a corneration in which they were use principal ordicers, well answing the true trade were worth chisi-erable less that the fice value of the time of their purchase, and that the trustees nevs charges the estate the

full face value of the bonds, plus interest; the complaint described the specific bonds which it was alleged defendant trustees had purchased. The cause was referred to a master who took evidence and filed a report, finding that the material allegations of plaintiff's complaint had been proven. Fred P. Heitman having died, an order was entered that the suit proceed against Ella G. Heitman, as executrix; objections and exceptions were filed to the master's report, which were overruled, and a decree was entered in accordance with the recommendations of the master; the decree ordered that plaintiff recover from defendants \$12,284.13. It is that decree which was reversed by this court.

In The People v. Waite, 243 Ill. 156, 160, it was held that when a cause was remanded generally it was not open in the trial court as to questions presented by the record and decided by the court of appeals; that "The judgment of this court as to all the points and questions presented and decided forever concluded the parties and they could not be reconsidered by the county court." The Supreme court further held that if no specific directions are given in the remanding order, "it must be determined from the nature of the case what further proceedings would be proper and not inconsistent with the opinion;" that "it is the duty of the court to which the cause is remanded, to examine the opinion and proceed in conformity with the views expressed in it. " To the same effect is Reggenbuck v. Breuhaus, 330 Ill. 294, 297. Plaintiff cites cases where the right to trial by jury was involved, which hold that where the judgment is reversed and the cause is remanded the lower court must proceed to a hearing de novo. These cases are not applicable.

In our prior opinion we reviewed the evidence and held "that all the evidence shows that the settlor, Mrs. Kinney, knew all of the mortgage bonds were being purchased from the Heitman Trust Co.

When a case of the court as to the true of the ent to dead ; bit suger to drugo moints and quastions ares the collection of the to and the general section of the general section of the general section of the contract of the general section of The suppress course of given is to read an angular and a newight whoshi in the same the to sistent wir was and in the seis 1.1 5.000 waic, the chart i al issi conformity of the second of the second Howerman V. 161. ... 1 whore the full print I are the over -_____ #\$L. #The 3 . Ilichile

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and that she wanted this continued until her daughter became 21 years of age; "that she had been one of the customers of the Heitman company from time to time and had purchased securities from it; that by the trust agreement she authorized the trusters to control and manage the trust property, "to exchange, sell, convertand reconvert, invest and reinvest" the trust property as might be considered by the trustees convenient or expedient; that it was expressly provided that the trust agreement should continue until the settlor's daughter was 21 years of age.

We found that "There is no evidence, nor even a suggestion, that the trustees did not follow the instructions given them in the trust agreement."

We noted that plaintiff's mother, the settlor, died in 1924; that plaintiff's bill, filed January 24, 1935, charged the trustees had violated their duties by purchasing bonds of little or no value, paying the full face value for them; that this charge, while not eliminated from the pleading, was abandoned on the nearing; and it was not until Way 4, 1936, nearly 12 years after her mother died, and about four years after plaintiff attained her majority, that she first sought to repudiate the purchase of the bonds. We held that "There is no evidence or suggestion that the bonds were not worth face value when purchased, and the fact that at the time of filing the suit they were of little or no value does not tend to show that defendants acted in bad faith in purchasing the bonds."

All the matters which were urged by plaintiff on the prior appeal were considered and decided by this court in the opinion rendered. Under such circumstances plaintiff was not entitled to a new trial, as the merits and law applicable were decided by us.

The decree ordered that defendants were entitled to the sum of \$1469 as reasonable compensation for their services, and that plaintiff pay to Philip C. Lindgren this amount, and that upon failure so to do execution issue.

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We found that the trustees distrible and the constant, that the trustees distrible and the constant is a second of the trustees are second of the trust agreement."

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The decree ordered that Je: the server and the constant of \$1469 as reasonable constants or the services, and plaintiff pay to Philip J. Loudyt a lie arount, no that we'n failure so to do asceptim there.

It was further ordered that the clerk of the court, with whom all the bonds and coupons of the trust have been deposited pursuant to the orders of the court, shall return to Fhilip C. Lindgren, surviving trustee, all of such bonds and securities, to be held by him until the sum of \$1469 allowed to him shall have been paid, and upon payment of this amount he shall turn over and deliver all the securities to plaintiff. Upon questioning of counsel for the defendants, all parties being represented, counsel agreed on behalf of his clients to waive any and all claim for services and agreed that all the provisions of the decree allowing anything to the defendants as compensation for their pervices may be stricken from said decree, and that the defendants be ordered to turn over to plaintiff all said securities.

The decree will be affirmed in all respects except as to the provision for compensation to the defendant trustees, which provision is hereby reversed, and the trustee is ordered to turn over and deliver all the securities in his possession belonging to Wilma E. Kinney to her.

The decree is affirmed in part and reversed in part and the cause is remanded with directions to revise the decree as ordered by this opinion; costs of this appeal to be divided equally between the parties.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

Matchett and O'Connor, JJ., concur.

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Matchett and C'Corner, Jt., .o. . r.

LESTER D. SUMMERFIELD,

Appellee,

VS.

HAROLD A. CLARK

Appelfant.

APPEAL FROM MUNICIPAL COURT

GHI CAGO.

THE FIRST NATIONAL BANK OF CHICAGO, a national banking association and corporation, and CHICAGO RAWHID MANUFACTURING COMPANY, an Illinois corporation, Garnishees.

300 L.A. 610

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

#3000 entered after trial by the court of plaintiff's claim for attorney's fees based on a contract between the parties.

Plaintiff is an attorney of Reno, Nevada, whom defendant, resident in Florida, retained in divorce proceedings to be brought in Nevada; the present action was brought in Chicago in order to attach defendant's money in The First National Bank of Chicago and Chicago the Rawhide Manufacturing Company; subsequently defendant made a cash deposit with the clerk of the Municipal court to support any judgment, and these garnishees were dismissed.

Defendant first says that plaintiff's services rendered in Reno were useless and unnecessary because plaintiff was advised that defendant's demicile was in Miami Beach, Florida, but that plaintiff loosely and improperly advised defendant that if he should stay six weeks in Reno any divorce obtained thereafter in Revada would be valid in any state in the Union.

In March, 1937, defendant lived in Miami Beach, Florida, with his wife and three children; there were unhappy differences between him and his wife; he went to Reno, Nevada, and consulted plaintiff with reference to securing a divorce. Defendant in this

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HAROLD A. ULLEA,

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Plaintiff is an ever regrow of one, even who will done, freedrags to be trought in Movada; the present cation was product in order to attach defendant's mand, is no creek to the colour in the Chicago Chicago to the company of the Kawnide bandiating company; such questions to support any doas cash deposit with he clork at the helpoph court to support any judgment, and these are the second in the second.

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court argues that plaintiff advised defendant wrongfully with reference to the validity of a Nevada divorce.

we do not pass upon this point for the reason that there are some differences of opinion on this subject in the decided cases, but more especially because there is a direct conflict in the testimony as to what plaintiff advised defendant in this respect. Plaintiff testified that defendant told him he intended to establish a permanent residence in Reno, Nevada; that plaintiff told him the bill for divorce could be filed at the expiration of six weeks residence, but that it would be better to live in Reno six months; but that if the wife entered her appearance in the case, any decree rendered would be valid and entitled to full faith and credit under the constitution of the United States. Defendant testified he told plaintiff he intended to resume his permanent domicile in Florida after the divorce residence of six weeks had expired.

The trial court, who saw and heard the witnesses testify, held with plaintiff in his version of what was said, and we cannot say this was manifestly wrong.

We hold the judgment must be reversed for the reason that the contract upon which this action is founded was secured by plaintiff while defendant was his client, by representations made by plaintiff which were coercive in their nature as not representing fairly the situation.

Plaintiff testified that in his conversation with defendant in March, 1937, he told him he could not fix his fees in advance of a contested action; that he would charge a retainer of \$250 at that time and, in the event the case was not contested, another \$250, making a fee of \$500; apparently this was agreeable to defendant.

The bill for divorce was filed in Rene May 7, 1937; in the

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the bill for tworce was tored a lead of 7, 1:37; to the

meantime defendant's wife had filed a bill for separate maintenance in a Florida court. July 2nd plaintiff wrote to defendant a letter concerning his fees; it was a long letter, very adroitly and persuatively written: it stressed the value of plaintiff's services; that the Nevada action should be tried before the Florida case was tried; that he, plaintiff, is carrying the burden of the litigation: he warned defendant that he "is involved in a very complicated mess": that the case is a "tough one" for defendant: that plaintiff has seen thousands of such cases and has never seen "a plaintiff husband with a tougher case to prevail in than yours"; that in spite of this defendant can ultimately win, although it is going to be a real hard battle; the advantages of proceeding with the Nevada action are set forth with some particularity. It is stated in the letter that it is customary in Reno for the plaintiff "in a case involving circumstances similar to yours" to pay to his attorney three times the amount allowed by the court to counsel for the defendant wife, and this is explained and argued at some length; he assures defendant that he is trying to be more than fair and that he is going to make the charge twice the amount paid to the attorneys for the wife; that he has been paid larger fees than this in cases that were not contested; there is an expression of a desire to discuss the fees no further, as plaintiff must give his undivided attention to the merits of the case. He then informs defendantthat the Nevada court has allowed for the wife's counsel in his case, as preliminary fees, \$5500. The letter again stresses the fact that plaintiff would carry the burden of the litigation; that plaintiff would credit the amount of \$500 already paid him and that defendant must pay him \$10,000 when he pays the \$5000 to the attorneys for the wife. Much more is said about the reasonableness of the fee and the "substantial concessions" made by plaintiff, a hope that defendant will feel quite satisfied with the charge plaintiff is

in a Moride cents. Of the control of the city concerning significant with the significant reterunica e di si di contra vi e di c tias the contract of the contr -- Single of the state of the s tion: ne worded derica of the color of the c mess"; tist but the side of the but is and has seen thousands on the sees of the sees that about the seed husband lite . tou ner comment bundand to this defendance and sixty and the control of the control of the same and the control of the c action are set found with the control of the car alter a section and the care action letter tank it is cast and it and it are the respectively. The second of the second secon was not not a compared to a compared the party sample of a sensit sample fendant "ife, and had a local additional all the same in a from the transfer of the second contract the second for the second contracts he is going to a course a selection at 3 (5.11 .6) for the wife; that are are been paid for a less that this as agrees that were not contested; that it against oot age to age cuse the fire no fur ever, went in the company on sent out tention to the merits of notine, 1 1 . I be of Man 2 2 1 . the Nevada court and cila and trung shave W sit 28 , ... preliminary fees, 4550. The late i speed fige Je 3011 Taitelous to the country to the test of principles there in the country to the co would credit the amount of the orear, and a second to the east must pay him glo, ded when sent got - sin a gir in your for the wife. and anore is east sugar size as a soul with defendant will feel quite eathalied eit. In _ ... to Littlia is

making and will say, "That is fine and is all right." There is also a suggestion that if the court makes a further allowance to the wife's attorneys plaintiff will be paid twice the amount of such additional allowance.

July 7, 1937, defendant replied to this letter, saying he considered the charges exhorbitant. He suggests that in addition to what has been paid \$1000 would probably be a fair amount; that he had discussed plaintiff's letter with his florida attorney who advised that plaintiff's charges should be lowered.

July 10th plaintiff wrote defendant arguing at some length for his position and stating that is defendant did not wish nim to go ahead plaintiff should be paid \$5000 for services to date and substitute other counsel, but that substitution of reputable counsel would not ordinarily be made until the atterney of record has been paid; that the Nevada case could not be abandoned as long as the wife had appeared; that she could proceed and have an adjudication in her favor which would be binding upon Clark everywhere. Defendant replied to this, saying he wished the plaintiff to continue to handle the case on the basis that defendant pay plaintiff the same amounts that the Nevada court ordered paid to Mrs. Clark's attorneys. It is on the basis of plaintiff's letters and this letter of defendant of July 16th that the present action is based.

In August, 1937, Clark and his wife, through their attorneys in Florida, settled their differences and in August she was granted a divorce in the Florida court; thereupon plaintiff was instructed to dismiss the Nevada action. Plaintiff testified that the order of dismissal was entered in the Nevada action and that that court ordered there be paid by Clark to counsel for his wife \$5000; that plaintiff secured from the Nevada court a reduction of this amount to \$3000. In the present action plaintiff seeks from defendant a like amount of \$3000, based upon defendant's letter of July 16th.

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 It has long been the established rule that where the relation of attorney and client exists it must always be regarded as one of special trust and confidence, and that any contract between them must be scrutinized with great closeness. As was said in Morrison v. Smith, 130 Ill. 304, 316, "So strict is the rule on this subject, that dealings between an attorney and his client are held, as against the attorney, to be prima facie fraudulent, that is to say, the burden is not upon the client to establish fraud and imposition, but the burden rests upon the attorney to show fairness, adequacy and equity. Jennings v. McConnell, 17 Ill. 148. " This has been cited with approval in Pratt v. Aerns, 123 Ill. App. 36; Eoyle v. Read, 138 Ill. App. 153; Elmore v. Johnson, 143 Ill. 513, 524; Ringen v. Ranes, 263 Ill. 11, 17; Feeney v. Runyan, 316 Ill. 246, 250; In re Kolb, 362 Ill. 190; and Masterson v. Wall, 365 Ill. 102, 110.

Reading the entire letters of July 2 and July 10, 1937, written by plaintiff to his client, Clark, leaves the impression that, while there is nothing in them which might be characterized as patently untruthful, yet they are so colored as to have a coercive influence upon the recipient. There are the suggestions that the Nevada case must precede any action in the Blorida court, and that if he, plaintiff, should withdraw as attorney from the case Clark must pay \$5000 before any reputable attorney would succeed him; there is also a covert threat as to what might happen if Clark should dismiss his Nevada action; and all through the letters there runs an undue stress on the necessity of retaining Summerfield's services. They adroitly tend to create a feeling of fear in action that he is in a precarious situation—a "tough ** mess."

We hold these letters do not present a fair and candid picture of the situation and that defendant's agreement, as indicated in his letter of July 16th, was obtained by the exaggerated

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and somewhat obscure picture of the situation portrayed by plaintiff, amounting to coercion. As pointed out by counsel for defendant, the bill filed on behalf of Clark in the Nevada court was a simple, one-page document charging cruelty.

It also should be said that defendant could reasonably conclude, from his first conversation with plaintiff touching fees, that in the event the suit was not contested plaintiff's entire fee was to be \$500. While plaintiff testified that he performed certain other services for defendant, this suit is based solely upon the contract with reference to services in the divorce proceeding.

Defendant has filed a counterclaim asking damages for alleged want of skill and diligence on the part of plaintiff. The trial court correctly found against this. Negligence or want of professional skill on the part of plaintiff was not proven.

In his letter of July 7th defendant says that in his opinion, in addition to the amount paid to plaintiff, \$1000 would probably be a fair amount. We are inclined to take defendant at his word. The judgment entered by the trial court is reversed and judgment for plaintiff against defendant for \$1000 is entered in this court.

REVERSED AND JUDGMENT ENTERED IN THIS COURT.

Matchett and O'Connor, JJ., concur.

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this court.

PECPLE OF THE STATE OF ILLINOIS ex rel. OSCAR NELSON, Auditor of Public Accounts of the State of Illinois,

8

HOME BANK AND TRUST COMPANY, a Corporation.

BEATRICE NOWAKOWSKI et al.,
Appellees,

VS.

E. E. MUELLER, Receiver of Home Bank and Trust Company, Appellant. APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

 $300 \text{ I.A. } 610^{\circ}$

MR. JUSTICE O'CONNOR DELIVERED THE CPINION OF THE COURT.

The Auditor of Public Accounts appointed a receiver of the Home Bank and Trust Company, a banking corporation of this State. and afterward filed a suit in the Circuit court of Cook county to liquidate the bank, which suit is still pending. Afterward a number of persons who owned "Certificates of Indebtedness" executed by the owners of certain real estate in South LaGrange, Illinois, for which the Home Bank and Trust Company was acting as trustee. filed their intervening petition contending they were entitled to pro rate with all of the certificate holders in \$20,000 which the bank had some time prior appropriated to the payment of some of the certificates held by it. After the issue was made up the matter was referred to a master in chancery who took the evidence, made up his report and recommended that the contention of the certificate holders be sustained and a decree entered accordingly. The receiver's objections to the report were overruled by the master, a decree entered in accordance with the prayer of the petition of the certificate holders.

and the receiver appeals.

The record discloses that three persons owned some real

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estate in South LaGrange and on April 15, 1927, executed a deed of trust to the bank as trustee, on the same day executed what is designated a declaration of trust to the bank of the same property. and ten days thereafter, April 25, 1927, the three cwners also executed 120 "Certificates of Indebtedness" for \$500 each, due on or before April 25, 1930. The real estate was pledged as security for the indebtedness and a number of the certificates were sold to the public. Some time thereafter the bank, at the request of the three beneficial owners of the real estate, sold part of the property for \$22,000 and after paying a real estate broker \$2000 for bringing about the sale applied the remaining \$20,000 to the payment of 40 certificates then held and owned by the bank. The certificates were cancelled and delivered by the bank to the makers thereof. Some time after this was done, the time of payment of the certificates remaining unpaid was extended for a period of three years, that is until April 25, 1933. The extension agreement was dated April 25, 1930. It provided, "The time of payment of Certificate of Indebtedness *** (apparently the certificates were numbered from 1 to 120) for \$500.00 attached hereto, is hereby extended by mutual agreement to Apr. 25, 1933, with interest at seven (7) per cent per annum, payable semi-annually, which interest is evidenced by six interest coupons for \$17.50 each, hereto attached and signed with the facsimile signatures of Charles H. Glashagel and Arthur N. Sanquist, who are the present owners of the property conveyed to secure the payment of the Cert. of Ind. herein described and interest thereon. The parties hereto mutually agree to pay said Cert. of Ind. when demanded, and agree that all of the provisions, stipulations, powers and agreements in said Cert. of Ind. and in the Trust Agreement securing payment thereof contained, shall remain in full force and effect except as herein in express terms changed and modified, and be binding upon the undersigned in the same manner as

estate in out. in Thege all of antile, and a product to de de trust to like a man of the west, or the sum of erect to the contract designated a declaration of rock to a control of our care can be delivered to \$ 1000 for a larger of the deal end to be executed 130 "Ger and a constant of the constant of the or before the later than the real and the second of The second of the second medical of the asset of it and not the public. so a Sid a error to a la a to a to the propert of the three benefited to transfer out to the read the relationed south enty for 20.00 and a second of the contract of the contract of bring in, cheat two ale solids we required the partial of the page -and out take all jobs. The beat and fall filtred IA to from tilicates fore unical. ETSER A BLE D. II. I D. T. POR 72. thereof. Some all first this was a subsection of the years, than it will not be a second of the s detect agril 28, 1100 . It was the both to be a line of the both made agove every linear to the control of the edge of to and from it is a first of the contract of t by mutual same out to we. I, and the hear at at cover (7) with all about a libiter, get a sales of the parent of the trop tog denoted by six i terest countries for . To e. . . reto abundants and signed with the furthelia all the end of courter . Ole angel and Arthur A. Sanquist, rue re ter creekt o mars an ame property conveyed to secure the paparett of the orth of the more the teneral et and interest tueress. In this erect out of the tuerest Jesus init Cert. of Ind. when desaided, a latter that out of a provisions, stipulations, powers and spreed to in sair tert, of ind, and in tare Trust Agreement sequence papers of the contained, and read in in how te , to series aborque at aleres at theore south but soro't that modified, and be binting a on the andersigeed in but same manner as if they had signed said Cert. of Ind. and trust deed."

This extension agreement was signed by the two comers of the property, the third owner having theretofore disposed of his interest to them, and it was also signed by the bank as "Agent for Owner of said Bond." Shortly before the execution of the extension agreement, which was after the bank had applied the \$20,000 above mentioned in payment of the certificates or bonds, the bank between April 3, 1930, and June 25, 1930, purchased all of the outstanding certificates except certificate number 19 and thereby became the owner of them. At various times thereafter it sold these certificates to the public at large and most of such certificates continued to be owned by such purchasers, although a few of the certificates were resold by such purchasers, and the intervening petitioners in the instant case are the owners of the certificates except that certificate number 19 is owned by another intervenor.

The evidence shows that after the bank purchased the certificates between April 3, 1930, and June 25, 1930, and resold them. the several purchasers thereof were not informed by the bank and had no knowledge that part of the property had been sold and the proceeds applied toward the payment of the certificates held by the bank. master found it was the duty of the trustee, the bank, to inform the purchasers of any material change in the status of the trust, and not having done so the purchasers were entitled to claim their proportionate share of the \$20,000. The master's report was approved in all things by the chancellor. We agree with this conclusion. All of the real estate (and the proceeds derived from the sale of any part of it) was pledged to secure the payment of all of the certificates. They were on a parity and the bank was not warranted in applying the \$20,000, the net proceeds derived from the sale of part of the real estate, to payment of certificates held by the bank itself. All the certificate holders should have been treated alike (and this

The control = - aisin property, on this case of the section of , 3 , 11 42.8 to them, it is a All inches which was after the comment of the payment of the contillation of animal and animal states to tangent and June 25, it has not consider the contraction of the contraction y ar a see that the stable disco domests At v-rious for a verse was a single of at the particular control to deepe for eggs. It purceasers, all being a control of the consenses of en en la guard out the pet far laressnotue the owners of the certifican end to expense owned by santons in it of

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was not changed by the fact that after the bank had applied the \$20,000 toward the payment of certificates held by it, it purchased the outstanding certificates and resold them) for the reason that the extension agreement which was attached to the certificates when they were resold expressly stated that the owners of the property who had executed the certificates, "are the present owners of the property conveyed to secure the payment of the Cert. of Ind." described; and it further expressly stated that all the provisions, powers and agreements in the certificates "and in the Trust Agreement securing the payment thereof" should remain in full force and effect except as changed and modified by the extension agreement. This extension agreement did not state the fact that part of the real estate had been sold and the proceeds derived therefrom applied toward the payment of other certificates owned by the bank. And for the same reasons, we think the owner of certificate number 19 is entitled to the same relief as the other certificate holders: there was attached to his certificate the same extension agreement as that attached to every other certificate.

It is also contended that the court erred in allowing petitioners' preferred claims against the receiver because "there is no proof of any funds paid by any of the petitioners in purchase of their certificates having been traced into or identified as part of the assets of the Bank which have come into the hands of this the Receiver." In support of this/cases of People v. State Bank of Maywood, 354 Ill. 519, and Colegrove & Co. Bank v. Gaupp. 357 Ill. 499, are cited. And it was held in those cases that the claims were not preferred.

In the <u>kaywood</u> case it was held that a depositor of a bank which was being liquidated was not entitled to a preference but must share <u>pro rata</u> with the bank's general creditors.

In the Gaupp case a preferred claim was allowed against the

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ment entered into by a partnership which conducted a private bank and which later became incorporated. In that case the court said: (p. 504) "The State bank never at any time had the trust fund, or any part of it, in its possession or custody, nor was it ever in control of such fund, nor did it ever exercise of attempt to exercise any dominion over the fund."

We think neither of these cases is in point. The \$20,000 was not deposited in the bank but was a trust fund received by the bank which belonged ratably to all the certificate holders. The bank had possession of this \$20,000 and apparently used it for its own purpose. We think it was not necessary that the funds be traced to the hands of the receiver. People v. Bates, 351 Ill.

439: People ex rel. Melson v. Chicago Bank of Commerce, 275 Ill.

App. 66.

A further contention is made by the receiver that petitioners! claims were barred by the 5 year Statute of Limitations and also by orders entered by the court in the liquidation proceeding fixing the should time within which claims/be filed. The statute relied upon is par. 16, chap. 83, Ill. Rev. Stats. 1937, which provides that certain actions on unwritten contracts shall be commenced within five years next after the cause of action accrued, and it is argued that the statute commenced to run not later "than the time of appointment of the Receiver of the Bank, or the institution of the liquidation proceeding in July, 1932;" it is alleged in the receiver's answer that the court entered an order September 10, 1935, barring all claims not filed prior to September 30, 1935, and that since petitioners purchased their certificates in May and June, 1930, and did not file their intervening petition until October 11, 1937, their claims were barred by the statute as well as by the order of court. We are unable to agree with either of these contentions. The evireceiver of above ... and a control of above ... and a control of a co

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*arap , - days a common of the area and a nest to 21 out 1 bearing to orders eat red by SELL LINEY LIST should I'm al Jim emil 16. chap. 30, L C 600 Nouse actions on a wrt "c. 数でおりり セマンエールム next after the The Court of Figure 1 to 1 statute committee institution cas use of the state of the stat the Reich er ... that the curry to a great that the contract of the street of claims not all the color of the color of the sound of the florers purchase a in a result of in a care ture are real winter the title title of the notice of the termination claims were be to the thirt or only to by the order of count. itans or the senteentlens. We are un.lib by mir- .it. dence shows the intervenors did not learn until shortly before they filed their petition, that the bank had not disclosed all the facts to them when they purchased their certificates. We think the statute did not commence to run until they had knowledge of the facts. State Bank & Trust Co. v. Comm. Tr. & Savgs. Eank, No. 40443, App. Court, 1st Dist., opinion filed May 22, 1939; Pa. Co. for Ins. v. 9th Bank & Trust Co., 306 Pa. 143; Duckett v. Mechanics! Bank, 86 Maryland, 400.

We are also of opinion that since the liquidation proceeding was pending the court had the right to permit the intervenors to file their petition, although it was not filed within the time specified in the court's order. The matter was entirely within the discretion of the court and we think the discretion was not abused.

The decree appealed from ordered that the Receiver make payment to the intervening petitioners or their attorney within ten days. We think the time should not have been so limited but the court should have decreed that the payments be made in due course of administration; accordingly the decree is amended in this respect and affirmed in all others.

The decree of the Circuit court of Cook county is modified and affirmed as modified.

DECREE MODIFIED AND AFFIRMED.

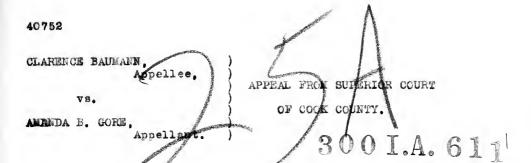
McSurely, P. J., and Matchett, J., concur.

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MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries sustained by him through the alleged negligence of defendant in driving her automobile, causing a collision between the automobile and a three-wheel motorcycle driven by plaintiff. The declaration was in two counts, the first charging general negligence and the second wilful and wanton misconduct. At the close of plaintiff's case the court directed the jury to return a verdict finding defendant not guilty as to the charges made in the second count, which was accordingly done. Defendant then put in her evidence and the case was submitted to the jury, The jury found in favor of defendant, and in addition to the general verdict a special interrogatory was submitted, viz., "Was the plaintiff Clarence Baumann guilty of contributory negligence which was the proximate cause of his injuries?" The answer in the affirmative was signed by each of the twelve jurors. Plaintiff filed a motion for a new trial which was allowed, the court stating that "his only reason for doing so is because he is of the opinion that he erred in giving instruction Number 13." The court at the same time set aside the special finding of the jury and the directed verdict entered as to count two, "because he could not grant a new trial on Count I without also granting a new trial on Count II. "

Upon petition by defendant we granted her leave to appeal from the order awarding the new trial, etc.

The record discloses that at about 1:30 p. m. November 16,

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production of the contract of plaintiff, one of re-the late of the weeks wit the return a verticat - De made it tro vec. n c r . 1 1 1 no voter a gast of the cold Larry L. The fury fight is well and mill. verdict a spect of them a g 0. J. O. . . . tiff Clarence a commence and area of this the profile to the second suffer is to be it in . It was to a the coat of bengin ask for a new trial vice so voice fairt were a roll Teaso, 107 6 % c ls 4 . Partie distant, al mivi, al aride the visit . . fig. i.e. t entered as to care ... on wount 1 with the two were and the same and

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1937, plaintiff was driving a three-wheel motorcycle south in Hinman avenue between Church and Davis streets in Evanston. Church and Davis streets run east and west and intersect Minman avenue at right angles; Church street is one block north of Davis street. the latter being the principal business street in Evanston. There are "stop" and "go" lights at Davis street and apparently at Church street also. The day was bright and clear and the pavement dry. Defendant lived in an apartment building located at the northwest corner of Hinman avenue and Davis street. There was a garage in connection with the building and defendant was driving her Ford automobile in the private driveway to the north of the building east into Hinman avenue. Automobiles were parked on each side of the Roadway of Hinman avenue - bumper to bumper. The motorcycle and the car collided and plaintiff sustained a fracture of the bones of his leg; he was taken to a hospital where he received attention.

about two or three blocks north of Church street; that just south of Church street he was going from 25 to 30 miles an hour in the west driveway of Hinman avenue; that the traffic was light; there were cars parked on each side of the roadway in Hinman avenue close together; that as he came south, and when he was about 175 feet north of Davis street, the lights for Davis street showed red; that he was familiar with the street and the fact that there was a garage and private roadway leading to it in connection with the building in which defendant lived; that he was employed by the Pure Oil Products company "picking up, loading and delivering cars, tires and batteries at its filling station at Davis and hinman streets in Evanston; that his place of employment was at the southeast corner of Hinman avenue and Davis street; that when a short distance north of the private driveway he was going about 18

1937, Mark ti or a company of the co CI I Shi d Mr. Mi and levis alval bns right wille; the laster D. C. Total ent are "top" as "L'" a street alre. Defordent 1 v.v. 1 in v. 1 dans miles en and the second of the second commencion vit vi vi vi autocobile in the contract of the selections to like o the shit has : ្រាង នៅពេក្ស សមាលេផ actention.

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Wendell Colbert, a chauffeur called by plaintiff, testified that he saw the collision; that he was sitting in an automobile which was parked facing north on the east side of Hinman avenue; that there was not much traffic in Hinman avenue at the time; that he first saw the motorcycle when it was at about Church street coming south at about 25 or 30 miles an hour; that he saw Mrs. Gore's car coming east on the private driveway; that she stopped her car on the west side of the sidewalk before coming out into the street; that she then started up and was going about 5 miles an hour, "going slow," when the motorcycle was 15 or 20 feet away. The motorcycle slowed down when it got about 15 feet from the automobile; it was then going from 15 to 18 miles an hour; that in the collision the motorcycle was thrown across the middle of the street and "slid along east."

Harvey Larsen, a seventeen-year old schoolboy, called by plaintiff, testified that at the time he was working at a hotel a little north of the private driveway on the east side of Hinman avenue; that he saw the collision; that he first saw defendant's Ford car coming out on the driveway when it was about a foot from the west edge of the sidewalk, and the motorcycle was then some distance north coming south at about 28 to 30 miles an hour; that when plaintiff got a short distance north of the driveway he slowed down; that the Ford was coming out at from 5 to 8 miles an hour;

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that Mrs. Gore started to turn north in Hinman avenue; that just before the collision the motorcycle was going from 15 to 20 miles an hour; that plaintiff put on his brakes and swerved to the east or left.

Two police officers, Hildebrecht and Mueller, employed by the City of Evanston and assigned to the "Accident Prevention Bureau" arrived at the scene of the collision shortly after it occurred, but it is not clear what the situation was at that time. One of the officers testified that Hinman avenue at the place in question was $35\frac{1}{2}$ feet from curb to curb; that Mrs. Gore was at the scene when they arrived.

These officers also testified in substance that in February 1938, they were present at a proceeding in the Municipal court of Evanston and heard plaintiff there testify that at the time of the collision he was driving at about 25 miles an hour; that when they arrived at the scene of the accident Officer Hildebrecht saw the witness Colbert, and Colbert at that time said plaintiff was driving his motorcycle at from 30 to 35 miles an hour at the time of the collision; that after making the investigation the officer went to the hospital and talked with plaintiff, who then told him he was going from 33 to 35 miles an hour.

Mrs. Gore testified that as she came out of the driveway she was going from 3 to 5 miles an hour; that before she crossed the sidewalk she made a complete stop and blew her horn. There is evidence that no one heard her automobile horn, and that plaintiff did not sound his horn as he approached the scene.

Plaintiff was called in rebuttal and testified that the officers came to the hospital shortly after the accident and told him they had to make a report, and that he said, "Well, put down anything. I don't like to talk about it now," and that was all he said. He further testified that in the Municipal court case he testified he

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was going about 25 miles an hour but that they did not there ask him whether he slowed down or what his speed was at the time of the impact.

Plaintiff contends that the court properly awarded a new trial and set aside the directed verdict as to the willful and wanton charge made in the second count of the declaration, because the evidence was sufficient to warrant the court in submitting the question of such negligence to the jury; and the case of Walldren Express Co. v. Krug, 291 Ill. 472, and other cases are cited. In the Walldren case the court said: "Whether the negligent conduct of a defendant which has resulted in injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury."

In the instant case we are clear there was no evidence from which it could legitimately be inferred that the conduct of defendant was sufficient "to show such a gross want of care as to indicate a willful disregard of consequences or a willingness to inflict injury." The evidence all shows that defendant drove her Ford car out of the garage, stopped at the west side of the sidewalk and then proceeded slowly into the street. The evidence was wholly insufficient to show such negligence on the part of defendant as would amount to a reckless disregard of the consequences. Schoenbacher v. Kadetsky, 290 Ill. App. 28. The court properly directed a verdict on the second count at the close of plaintiff's case, and it was error to set the directed verdict aside even if the court was of opinion there was prejudicial error in the record as to the issues raised by the first count and defendant's answer thereto.

Defendant contends that because the evidence showed plaintiff was guilty of contributory negligence as a matter of law, the court

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improperly awarded a new trial. We are unable to agree with this contention. We are of opinion, however, that the overwhelming weight of the evidence shows that plaintiff was guilty of contributory negligence and that no verdict could stand on this phase of the case except one for defendant. But in this view the law requires that the case be submitted to a jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206. The case was submitted to the jury, it found in favor of defendant and specifically found that plaintiff was guilty of contributory negligence.

But plaintiff contends it was prejudicial error for the court to give instruction number 13 requested by defendant, and therefore the court properly awarded a new trial. Instruction number 13 is: "II you find that the defendant Amanda B. Gore before emerging from the private driveway brought her automobile to a complete stop immediately prior to driving onto the sidewalk or into the sidewalk area extending across said private driveway and if you further find that cars were so closely parked along the west side of Hinman avenue on the north side of said private driveway that the defendant Amanda B. Gore could not see the plaintiff until she had driven out into and entered Hinman avenue, then, if you so find, you are further instructed that although the defendant Amanda B. Gore's view was obscured by parked cars she was not required to again stop after crossing the sidewalk or the sidewalk area extending across said private driveway and before entering Hinman avenue. because the same danger/would require her to stop would prevent her from again starting." We think this instruction is clearly wrong because it singled out certain evidence, and it was further error for the court to tell the jury that Mrs. Gore was not required to again stop after crossing the sidewalk, etc. The jury should have been left free to consider all the evidence and pass on the question as to the conduct of Mrs. Gore.

improperly awarded a new trial, educed to the contention. The state of the contention of the state of the sta

int plaintiff convenie it was erroudicial error than court to wive instruction number la requested by derendant, and therefore the court error rly exercise a new tried. I hatm citem numb, r 18 is: "il you lind that the defondent Amerika . . Dure before emerging from the private drivewey arought her hato obile to a complete atop inmediat by prior to driving orto the elegrant or into the sideralk area extending corpse out orivate drivewey and If you further find that card were so closel, or hed closed west side of Alman average of a corte cide of the standard of the sample of that the definition to wearle of Gor could be the old, it and the os ser it, ress , caeva counti bertared the overs, and and and see se find, you are lumbher instructed that (lit.out) the lerion that amonda B. Gore's view was obscured by narred cars and was not required to again stop after creath the sidewalk or him attendik area and nating across said private driveway and helder autering blunca avene. because the same danger/would require her as stop mult prevent her from again starting. " We trink this instruction is ally wrong because it singled out correin evenes, and it eas incier error for the court to this the jury that him. Core was not required to again stop after crocking the sidewalk, etc. the jury ancila have been left from to consider this the evaluation on the question as to the conduct of Mere, bore. We are of opinion, however, that the court should not have awarded a new trial in view of all the evidence in the case because, as above stated, no verdict could stand except one in favor of the defendant since the overwhelming weight of the evidence shows plaintiff was guilty of contributory negligence. The court gave the jury twenty instructions - many more, we think, than should be given in a case of this kind - and upon a consideration of them we think the jury, in view of the fact that the issues were si ple and easily understood, was not misled.

The judgment of the Superior court of Cook county is reversed and the cause remanded with directions to enter judgment on the verdict as rendered.

REVERSED AND REMANDED WITH DIRECTIONS.

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McSurely, P. J., concurs.

Matchett, J.: I concur in this result on the theory there was no evidence from which the jury could reasonably find defendant guilty on either count.

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NORA M. FROEHLER,

Appellant Plaintiff

CIRCUIT COURT

COOK COUNTY.

APPEAL FROM

NORTH AMERICAN LIFE INSURANCE COMPANY OF CHICAGO, a comporation.

Defendant - Appellee.

MR. PRESIDING JUSTICE DENIG E. SULLIVAR DELIVERED THE OPINION OF THE COURT.

This case was before this court on a former appeal brought by defendant, the Circuit Court having entered a judgment for plaintiff. At that time this court reversed the judgment and remanded the cause.

The following pertinent facts were presented on both trials: On April 1, 1932, Thomas D. Froehler, husband of the plaintiff, received a life insurance policy upon his application for \$10.000.00 from the North American Life Insurance Company of Chicago. and the company issued its receipt for \$201.60, acknowledging payment of the first annual premium.

The second annual premium was due on April 1, 1933, and was not then paid, nor was it paid within the 30-day grace period. Consequently the policy lapsed on May 1. 1933.

It further appears that the policy which was issued contained the following provision:

"Reinstatement - This policy may be reinstated after default in payment of any premium upon evidence of insurability satisfactory to the company, subject to the payment of past due premiums, with interest at 6 per cent per annum thereon. * **

It further appears that on May 5, 1933, Mr. Forehler executed his application for reinstatement and forwarded the same by mail to the company, together with his check for \$53.43 in payment of the first quarterly premium for the second year of the policy. There is

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It further appears in a contact, we want the areas earlies applies that applies that the sent to the company, together with the meech for "a", 45 in a yeast of the first quarterly presides for the moond year of the colley. There is

some dispute as to whether the receipt was dated May 4, 1933 or May 5, 1933. In the application accompanying the check Mr. Froehler answered in the affirmative the question as to whether he was in good health.

The receipt which was given by the company for money that was paid at the time of the reinstatement, contains the following provision:

"It is understood that this payment is in no way binding upon the said Company except that said Company agrees to return the amount received in case the Company declines to reinstate said policy.

"Note: If notice of approval is not received within thirty days, the amount tendered will be refunded by this Company on

request."

It is also part of the facts that on May 19, 1933, two weeks after the date of application for reinstatement, the company mailed a letter to Mr. Froshler notifying him that said application was declined because the evidence of insurability was not satisfactory, and enclosed its check for \$53.43, in refund of the amount forwarded with said application.

In the original application ar. Froehier answered in the negative every question as to the existence of any physical ailment, including those as to the existence of any impairment of vision or hearing or diseases of the eye or ear.

It also appears as a part of the facts that Mr. Froehler consulted Dr. Loyal Davis at his home one evening about a week or two before he went to the hospital; that at that time he complained to Dr. Davis of headaches which were associated with vomiting on one or two occasions, difficulty of vision, and he stated he had suffered a progressive loss of vision for the past two years and that his left eye was then useless.

On May 17, 1933, Mr. Froehler went to the Passavant Hospital for observation for brain tumor where he was operated upon and died.

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On Eng 17, 1937, w. Frosh to seek to the seek to the not the time to week to come a come on the come of the come o

The opinion filed in this case when it was here on appeal the first time, is reported in the 289 Ill. App. 403.

on the second trial before a judge and jury, the jury again returned a verdict in favor of plaintiff for the sum of \$12,479.29. Upon a motion for judgment notwithstanding the verdict, the court set aside the verdict of the jury and entered judgment for defendant, from which judgment plaintiff brings this appeal.

No question is raised upon the pleadings.

Plaintiff claims that under the decision heretofore rendered in this cause by this court, wherein the judgment was reversed and the cause remanded, it was the duty of the trial court not to disturb the verdict of the jury which was rendered after submission of the case to the jury under instructions as to the law, as outlined in this court's former opinion.

Defendant's theory of the case is that under the evidence submitted and the law as announced in this court's former opinion, it was entitled as a matter of law to a directed verdict.

Although this case has been argued at length on the theory that new evidence has been adduced which would substantially change the facts as found in the former case, we do not find any new evidence of such controlling character as would cause us to make a different decision at this time than xxxxions on the former appeal. It still remains true that the original policy of insurance had expired; that the provisions of said policy entitled the plaintiff to make an application for reinstatement upon the evidence of insurability satisfactory to the company, subject to the payment of past due premiums and its reinstatement of him then would restore all his rights under the original contract of insurance and same would be in full force and effect. The application for reinstatement of the policy was made out on the blank furnished by the insurance company. The receipt which was attached to the application for reinstatement, reads in part as follows:

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"It is understood that this payment is in no way binding upon said Company, except that said Company agrees to return the amount received in case the Company declines to reinstate said policy. " "

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"Note: If notice of approval is not received within 30 days the amount tendered will be refunded by this Company on

request."

Application for reinstatement was made on May 4, 1933, and the refusal on the part of the company to reinstate the plaintiff's contract of insurance was dated May 19, 1933. During this interim it developed that knowledge had come to the defendant company that the plaintiff was suffering from tumor of the brain which had existed for some time and on the evening of May 19, 1933, he died as a result of the operation which was performed that day. The premiums were returned by the insurance company and a letter of refusal of acceptance. In answer to this the plaintiff claims that the insurance company took too much time in passing upon the question of reinstatement. No time limit was provided for in the contract and what should be considered as a reasonable length of time is not set forth either in the contract of insurance or the reinstatement, nor does counsel suggest just what time should have been taken for such consideration.

The facts presented for our consideration disclose that plaintiff's intestate should not have been reinstated because of his physical condition and we think the defendant insurance company was justified in taking sufficient time to discover the real facts. That being true, there was no contract of insurance between plaintiff's intestate and the defendant insurance company at the time of his death.

In the former opinion filed by this court, entitled,

Froehler v. North American Life Ins. Co., 289 Ill. App. 402, the

court having discussed the matter with relation to reinstatement, said:

[&]quot;This conclusion is supported by the facts referred to in the opinion, and when we consider this progressive loss of sight, there is only one decision we are obliged to make upon the record before this court, and that is that the applicant's

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the refused on the sart of the commons to reforest the desiration the refused on the sart of the commons to refore the interimation of insurance were detect May 13, 1887. The interimation of incommons that the commons that the plaintiff was suffering the common of the order of the order of the contract of the operation which were reming of May 18, 1887, he died on a result of the operation which were transmit into the persions again the coersion which were the transmit of the operation of the transmit of the insurance some of the insurance some of the insurance some that it is the insurance company took too such that it was nevertable of the insurance company took too such that it was nevertable in the contract and that are nevertable in the contract of insurance in the contract of insurance or with reference in the contract of insurance or with reference in the contract of insurance or with reference, that the the stable that contract of insurance or with reference, the contract of insurance or with reference, the contract of insurance or with reference, the contract of insurance or with reference for such consideration.

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Froshler v. Gorth American sufe Inc. 20., 38 1sl. 4co. 47, the court having discussed the uniter with wel tile to relinal resent, said:

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*This conclusion in susperted by the form referred to in the opinion, and when we consider this progressive tous of sight, there is only one decision we be sounded to also upon the record before this this that in a respect to the thirt is the spanions.

condition was such that he was not an insurable risk at the time he made application for reinstatement."

There is much discussion as to what, under the law, the trial court should do relative to the various motions made and also as to the rulings to be observed on motions to direct a verdict at the conclusion of plaintiff's case or at the conclusion of the entire evidence or on a motion for a judgment non obstante veredicto. We do not think it is necessary for us to discuss these questions at this time. There have been two trials and the plaintiff had ample opportunity to demonstrate that she was entitled to recover, if she had, but we now conclude from a review of the evidence that no recovery should be had. We think the trial court could well have entered a directed verdict at the conclusion of plaintiff's evidence, but this was accomplished substantially by entering the judgment non obstante veredicto.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND SURKE, JJ. CONCUR.

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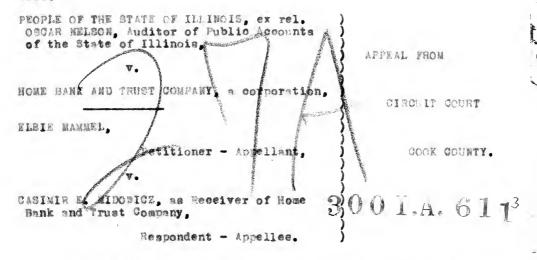
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MA. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On March 31, 1936, a trust agreement, known as Trust No. 863. was executed between the Home Bank and Trust Company and Julia G. Vidvard, under which the bank was to take title, as trustee, to certain real estate in Lake County, Illinois. The real estate was then owned by Julia G. Vidvard, and the agreement contemplated that the real estate would be sold as subdivision property. Julia G. Midward was the sole beneficiary of the trust. On April 8, 1936, Julia G. Vidward conveyed the real estate to the bank as trustee under Trust No. 863. On August 28, 1927, Elsie Hammel purchased through the Vidward Realty Company the property known as Lot 140 in Lotuswoods Subdivision, Lake County, Illinois, for the price of \$1,400.90, made a down payment of \$50.00 and agreed to pay \$230.00 within ten days, at which time a contract of sale was to be executed. The lot was part of the real estate included in the trust agreement. The trust agreement provides that the trustee shall be paid \$840.00 for accepting the trust and reasonable compensation thereafter. It paid to itself from the assets of the trust \$840.00 as its acceptance fee and \$252.11 for other services rendered by it as trustee. A contract for a deed for the lot, dated August 28, 1927, was signed by Elsie Mammel, and

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is between herself and the bank, as trustee. A clause thereof reads "This Contract is made by the undersigned not individas follows: ually but as trustee under a certain trust agreement known as Trust No. 863. Said trust agreement is hereby made a part hereof and this contract is enforceable only against and any claims hereon are payable only out of the trust property held thereunder. Any and all personal liability of the trustee being hereby expressly waived by the parties hereto. (Signed) Home Bank and Trust Company, By John J. Blazon, Asst. Secretary". A provision of the trust agreement between the settler and the bank was that a purchaser was not obliged to see to the application of the purchase money, and that a purchaser was not privileged to inquire into any of the terms of the trust agreement. On June 14, 1932, the bank was closed by the Auditor of Public Accounts and a receiver was appointed, and on July 22, 1932, the Circuit Court of Cook County entered an order approving and confirming such appointment. On March 7, 1933, Elsie Mammel filed her petition in the liquidation proceedings, wherein she set out what has above been recited, and in addition states that she paid the purchase price of \$1,400.00 called for by the agreement and the further sum of \$148.85, or an aggregate sum of \$1,548.85, being the full and complete payment in accordance with the agreement; that on completing the payments, she requested and demanded from the bank, as trustee, the conveyance to her of title to the land described in the contract: that the bank at all times failed and refused to convey the same to her as contemplated in the contract; that from time to time she requested and demanded that the bank return to her the amounts of money so paid by her; that the bank failed and refused to comply with her request, except to offer her a compromise of \$1,200.00 which offer was made prior to the institution of the liquidation proceedings. and she prayed that an order be entered directing the receiver to

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me follows: "This care I is a mid by the I will be added as terms of the transfer of the same terms of the terms of t with reporting and it were be, there are also as we will be about along the second and the first through the transfer of the first transfer of the state of the first transfer of transfer of the first transfer of transfer of transfer of transfer of transfer of tra while because the chilles of the freeze error are also entreed the ा पुण कुणान १००१ हर १० १८ १८ १८०० । १८०५ के लिए के दिल के माने के देव कर देवा है के कि कार्य कर करी है 😿 doing it distant, rest. "Free my". The series of the rest of the the state of the s -motor from the to meet the fit to yet this stands of the first for some Accounts and a remainer of the contract of the state of t TREASON TO THE PROPERTY OF THE and a spointment, the sear of the seasons of the seasons and a seasons as a season of the seasons of the season in the Hould tion everetic of the new to the contract of the acity actions for the section of the section of the feetbook need To many a street of the day of the series and it was because on , con . It to APRICATED THE THE REPORT OF THE PROPERTY OF TH - yen wis pino once o to piconersto of the state of the order BECT CONTRACTOR TO THE TOTAL OF the matter of the language of anti-state and of some Anatog the the bonk of the party of the party in the same of the are well in well convictors; the contract of at batalementos as tod To statement and demonstrate the near training of the tent of the tent of money so had by her; this the same a tred and beautes as the first of the death with offer was made prior to the thatiteti a of the limidation proce lings, of training of the party of the state of the server be been to

answer her petition and directing the receiver to pay to her the sum of \$1,548.85, together with interest thereon from the date of payment tas a prior and preferred olsim upon the sasets of said Home Bank and Trust Company, and for such other relief in the premises as to the court shall seem meet". In its answer, the receiver stated that the \$50.00 payment of August 28, 1927, was made direct to the Vidvard Realty Company, and that the \$230.00 payment of September 5, 1927, was also made in the same way, and admits receipt of all other payments. It asserted that the contract on which petitioner based her rights showed on its face that it was not enforceable against the bank in its individual capacity, or against the receiver or against any assets in the hands of the receiver. cause was referred to a Master in Chancery, who found that petitioner had paid the entire sums plus interest, with the exception of \$50.00. to the bank; that the contract provided that upon payment of one half of the purchase price, the trustes would execute a deed, the balance to be evidenced by a note secured by a trust deed; that petitioner made the payments; that upon completion of fifty percent of the payments. she made demand upon the bank for delivery of the deed; that the bank, as trustee, made excuses to her for failure to deliver the deed and suggested that she continue to make monthly payments; that pursuant to that suggestion, she made further payments on account of principal and interest so that the aggregate payments made by her amounted to the sum of \$1,557.83. The Master found that the contract established the relation of vendor and vendee; that she was placed upon notice by the terms of the contract; that she was dealing with the bank not personally but in its capacity as trustee under Trust No. 863, with the liability of the trustee limited to the trust property conveyed under the trust agreement; that it was not intended that the bank

જાર કે છે લેક જેવા કે કે કે કે કે કે જાજાર કે મુક્ક કે માટે જે જાજાર કે માટે માટે માટે જે જાજાર કે માટે માટે જે The state of the s Bowe Bank rate transfer on the Bo the transfer on the and the second the second of the second seco Fig. 2 to the first of the control o direct to the literal willy and you be the first of the of Patenter t. 1997, ... of the second to imales to design to the property of the second of the seco ⇔កធាធិសារីរាស់ សំ មាន ១០ នាំខ្លុំ ១០ ស៊ីស៊ី មាស និង និង ១០ និង ១០ ស្រី ស្រែក ស្រីស៊ី កាគេកាលី បាក់កាធិបី និងបិយ ក្រុម នៃការប្រកាសន៍ នៅក្រុម នៅ នៅក្រុម នៃ នៅ នៅ នៅក្រុម និងក្រុម ក្រុម និងក្រុម ក្រុម និងក្រុម ក្រុម និងក្រុម with the control of the state o gray do the exact that the state of the control of the control of the state of the រំនុំស្រា ការរបស់ និង និងស្រាស្ត្រ (ស្រាស្រាស់ និង ស្រាស់ សារស្រាស់ សារស្រាស់ សារស្រាស់ សារស្រាស់ សារស្រាស់ សារ of the mandanes it are to the terminal and the state of the state of the state to ging van litter to it is to be a second of the second of t The manner and the termination of the second augment the telephone winter when a new or new telephone the telephone augment Institute to to come on the control of about the invite sign and of as be the the the other other and early only the thought bar the well-ation of remitter this verifies to the the term while the contract of देवत असर्थ असे संसंबं करेंग हो है । असर ए यह इसका नाम कर नाम है। सम्बद्ध कर्म पूर्व paraonally but its on the or true car true the both but its the limitity of the trust a distinct to a rate of the transmity of RALE SHE STURE SPEECH STATE IN S. II SOME STORE SPEECE BASE THE TRACE

would hold the moneys paid either as esorowee, stakeholder or in any other capacity; that petitioner had no claim in equity against the assets of the bank or the securities deposited with the auditor and recommended that her petition be dismissed for want of equity. She filed objections, one of which was that the Master erred in not finding that Julia Vidvard was indebted to the bank in the sum of \$12,000.00, and that in order to secure the indebtedness she transferred and assigned to the bank all her right and interest in and to the property held by the bank, as trustee, under Trust No. 863, and the proceeds and avails thereof, so that the bank was to all intents and purposes the sole beneficiary under said trust. Another objection was that the bank, as trustee, under Trust No. 863, had a credit in said trust of \$1,184.05, which represents an asset of the trust which accrued by reason of the payments made by petitioner to the bank, and that petitioner was entitled to recover the sum of \$1,184.05 for application against the total amount of her claim and to recover the remainder of her claim from the securities deposited with the auditor. The Master amended his report by adding "That the said Julia G. Vitvard assigned her beneficial interest in and to said Trust No. 863 to the Home Bank and Trust Company, a corporation, as security for the payment of an indebtedness in the approximate sum of \$12,000.00". In all other respects, the objections were overruled. The remaining objections were permitted to stand as exceptions. The receiver did not file any objections or exceptions. The exceptions of petitioner were overruled and a decree entered dismissing the petition for want of equity, to reverse which this appeal is prosecuted.

In his brief in this court, the receiver argues that the findings of the Master that the payment of \$230.00 was made to the trustee, and that Julia G. Vidvard assigned her beneficial interest in Trust No. 863 to the bank, are not supported by the record. No objections as to these findings were filed with the Master and no exceptions were filed with the Chancellor.

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referred to a master for his determination, it is the duty of the parties, when notified, as was done here, to appear before his and there contest the matter, and if his findings are not, in their judgment, supported by the evidence, it is their duty to interpose their objections, so as to afford the master an opportunity to modify his report if it should happen to be wrong; and if in such case, after hearing the objections, the master declines to modify or change his report, it is the duty of the objecting parties, after it has been in court, to appear there and file exceptions to it; and when this course has not been pursued, and no sufficient reason is assigned for not doing so, as was the case here, the report of the master when approved by the court, will be deemed in this court conclusive upon the questions covered by it." (Jewell v. Nook River Paper Co., lol Ill. 57, 68-69. See also Marble v. Thomas, 178 Ill. 540; Hurd v. Goodrich, 59 Ill. 450; Udstuen v. Illk, 291 Ill. 443, 448; Johnson v. Voudrie, 233 Ill. Appl 573, 576; Oreger v. Boyer, 297 Ill. App. 581).

Therefore, the receiver cannot be heard to complain as to any findings of the Master.

The first proposition advanced by petitioner is that the bank, as trustee, under Trust No. 863, having failed to convey the parcel of land in question to patitioner as it contracted to do upon payment by petitioner of the consideration therefor, the petitioner is entitled to recover the amount of the consideration so paid by her out of the assets of Trust No. 863. The receiver repels the contention by saying that the petitioner is in this court for the first time asserting a claim to recover out of the assets of Trust No. 863, such claim not having been made in the Circuit Court by pleadings or proof. If the claim was not made in the court below, it cannot be made here. Petitioner's intervening petition set up the ultimate facts on which the claim was founded and concluded with a prayer for specific and general relief. One of the objections to the Master's report was that he overlooked finding that the bank, as trustee under Trust No. 863, had a credit in the trust in the approximate sum of \$1,103.00. Because at the time the objections were prepared the transcript of the evidence was before the Master, the amount stated as a credit in the trust was \$1,103.00 whan it should have been \$1,184.05. The error was later corrected. There was a further objection that the Master erred in

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not allowing the claim as a preferred claim and directing payment first from the assets of Trust No. 863, and second from the securities deposited by the bank with the auditor. The notice of appeal prays that an order be entered directing the receiver to pay petitioner the sum of \$1,557.83, together with interest thereon, from the fund of \$1,184.05 appearing as a credit to Trust No. 863, so far as such fund is available, and the balance from the proceeds of the securities deposited with the auditor.

we are of the opinion that the claim to recover out of the assets of Trust No. 863 was properly asserted in the trial court and, therefore, may be asserted here. Despite the argument of the receiver that the contract for the deed was between the Vidvard Realty Company and Elsie Mammel, we find that the contract was between the Home Bank and Trust Company, as trustee, and Elsie Hammel. Under the trust indenture the beneficiary was Julia G. Vidvard. As the payments were made to the trustee, it was the latter's duty, after deducting its charges, to remit the balance to Julia G. Vidvard. In his supplemental report the Master found that the beneficial interest of Julia G. Vidvard was assigned to the bank in its individual capacity. The bank has on hand credited to Trust No. 863, the sum of \$1,184.05. The only person, apparently, who could claim any interest therein is Julia G. Vidvard. According to the record, she assigned her interest to the bank. The Master found that the petitioner, having made payments on account of principal to the extent of one half of the purchase price, together with accruing interest from time to time, made demand on the bank for the delivery of the deed; that the bank, as trustee, made excuses to her for failure to deliver the deed and suggested that she continue to make monthly payments, and that pursuant to the suggestion she made further payments on account of principal and interest so that the aggregate of payments made amounted to the sum of \$1,557.83. His findings and recommendations overlooked

not allowing the claim as a referred of is an arrived the second from the securities deposited by find the ite ine address. The motion of appeal prays that an order on authorities involved to the position of petitioner the author of the information with appeal prays the author of the continue of the fact of the field of a resident of the securities deposited with the incliner from the securities deposited with the incliner from the reposeds

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to the sum of tl. 557.83. His findings and recommendations overlanked

the sum of \$1,184.05 to the credit of Trust No. 863. The basis of his recommendation was that the liability of the bank as trustee was limited to the trust property conveyed, and that she had no claim against the assets of the bank or the securities deposited with the auditor. After the bank was closed, the receiver tendered a deed. We are satisfied, however, that at that time, in view of the failure of the bank, as trustee, to deliver a deed, she had a right to insist on the return from the receiver, to the extent of assets in the trust, of the amounts she had paid. As the matter stands, it would be a great injustice to allow the receiver to retain \$1,184.05.

Finally, Julia G. Vidvard maintains that she is a creditor of the bank as a result of the acceptance by it of an express trust, and that as such creditor she is entitled to have her claim paid out of the securities deposited. The duties which the bank as trustee undertook are circumscribed by the trust instrument and the agreement for the deed. The letter contains the clause that "this contract is enforceable only against and any claims hereon are payable only out of the trust property held thereunder. Any and all personal liability of the trustee being hereby expressly waived by the parties hereto". We are of the opinion that in the absence of bad faith, dishonesty or misconduct, the claim of Elsie Mammel is enforceable only against the trust property. The Master was right in finding that her claim could not be allowed as against the accurities deposited with the auditor. By the express language of her contract she was limited to the trust property insofar as any claim against the trustee was concerned. In his brief, the receiver states that there is a cash balance on hand to the credit of Trust No. 863 of \$1,184.05. This smount should be paid to the petitioner.

Total and a service of the service o its many property and the second of the seco and the time one law or are realth. drawing, but but to a constituent for you extremined or desirable ing diament and a large large of the common and the formation and the second and enforceable only on text out our law board as the outer and are ទ្រីរដ្ឋី។ និង របស់ស្រាស់ នេះ នេះ ស្រាស់ស្រាស់ អាចមាន មាន ស្រែក ស្រែក ស្រែក សាសាសាល់ ១៩៩៩ ដី២ of the treater tein, in moly or a mary live by the earties her ton, se are of the outling that he were basened of a diffe alstrancy or misconquet, the slutt of late . . set is referred the entry of inet the true or a stage the stage of a so so the section of the sectio must per company of a significant but the contract to blues outline. By the errors and a confine to the form and the following the f the truet property inoperture of Listan supraction of the concerned. In his brief, the recreament of test that the re t smount whould be not to the ministering.

Because of the views expressed, the decree of the Circuit

Court of Cook County is reversed and the cause remanded with directions,

to enter a decree that the receiver pay to claimant Elsie Mammel

the sum of \$1,184.05 credited to Trust No. 863, and to disallow the

remainder of her claim.

REVERSED AND REMARDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

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MARIE MIZWINSKI, individually and as administratrix of the estate of John Biernat, decembed, et al.

Appellee.

FRANK BIERNAT, Mary BIERNAT, et al.,
On Appeal of Mary Biernat,

Appellant.

APPLAT ROM

CIRCULT COURT

COOK COUNTY.

300 I.A. 6114

MR. JUSTICE BURKE DELIVERED THE OPINIOR OF THE COURT.

On October 24, 1935, John Biernat, the owner of the real estate commonly known as 1901 West 21st Place, Chicago, died intestate leaving him surviving his widow Mary Biernat and seven children, one of whom was Marie Mizwinski, a daughter. On February 3, 1937, the widow duly quitclaimed to Marie Mizwinski her undivided one third interest in and to said real estate. On February 26, 1937, Marie Mizwinski was appointed administratrix of the estate of her father. Subsequently, Marie Mirwinski, individually and as administratrix of her father's estate filed a petition in the Circuit Court of Cook County to partition the real estate. On August 4, 1937, a decree was entered which found inter alia that Mary Siernat, the widow. quitelaimed her interest in the real estate to Marie Miswinski; that the deed was duly executed, acknowledged, delivered and recorded: that Marie Mizwinski, as an heir and by virtue of a quitolaim deed by Mary Biernat, possessed a 9/21sts interest; that Michael Biernat, Edward Biernat, Frank Biernat, Joseph Biernat, Anna Koranchan and Charlotte Biernat respectively, and each of them, possessed a 2/21sts interest; that the premises were subject to a first mortgage to the Piast Federal Building and Loan Association in the sum of \$602.07: that the property should be partitioned; and appointed three commissioners to make partition. The commissioners reported that

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the real estate could not be partitioned and the court ordered the property to be sold. On October 7, 1937, Mary Biernat was given leave to file an intervening petition. The intervening petition, filed on October 18, 1937, sought to set aside the quitclaim deed given to Marie Mizwinski on the ground that the deed was given in consideration of the promise of Marie Mizwinski to take care of petitioner for the rest of her natural life, and that Marie Mizwinski broke her promise, and that therefore, the conveyance was null and void because of failure of consideration. Marie Mizwinski answered the petition. On December 18, 1937, while the intervening petition was pending and undetermined, the property was sold at a Master's sale for \$1,700.00, and the cause was referred to the Master to make allowance for Master's fees, solicitor's fees, costs etc., and to state an account among the parties. On June 23, 1938, the Master filed his report and recommended that the intervening petition of Mary Biernat be dismissed for want of equity, insofar as her contention... that the quitolaim deed should be declared invalid, was concerned. The Master also found that the appraisement of the widow's award was duly made in the Probate Court in the sum of \$700.00, which appraisement was approved by the court; that on May 4, 1938, an order was entered in the Probate Court, stating the amount of attorney's fees. administratrix's fees and costs of administration. The Master further reported that the property was sold for \$1,700.00: that he paid \$685.65 on the first mortgage, leaving \$1,014.35 for distribution; that he proposed to distribute the balance of \$1,014.35 as follows: To the Master in Chancery \$283.80; to plaintiff for amounts paid for court costs, sheriff's fees, abstract charges and other incidental expenses including \$350.00 for attorney's fees, \$656.10; charges for commissioners at sale, \$30.00, making a total of \$969.90; that there remained a balance of\$44.45, which the Master recommended be paid to

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Marie Mizwinski, as administratrix of the estate of John Biernat, to be distributed by her in accordance with the directions of the Probate Court. The widow objected and asserted that the Master erred in not proposing to distribute the \$1,700.00 as follows: (a) payment of \$685.65 to Plast Federal Building and Loan Association; (b) payment of \$225.20 to Marie Mizwinski as Administratrix of the estate of John Biernat, as per the order of the Probate Court entered on May 4, 1938; (c) Payment of \$700.00 to Mary Biernat, for and as her widow's award allowed in the Probate Court; (d) The balance to be applied toward the necessary costs and expenses in this partition proceeding. She also maintained that the Master erred in not finding that the widow's award of \$700.00 should be paid after the payment of the mortgage and the necessary costs of administration in the Probate Court, and that all other items are subject and subordinate to her right to collect her widow's award. The Master overruled the objections, which were allowed to stand as exceptions before the Chancellor, who overruled the exceptions and entered an order for distribution in accordance with the recommendation of the Waster: from which order this appeal is prosecuted. The court also entered an order dismissing the intervening petition of Mary Biernat for want of equity. No exceptions were filed to the report of the Master finding that the quitolaim deed from the widow to Mary Mizwinski was valid and no appeal has been prosecuted from that part of the order.

The first point for us to determine is whether the quitclaim deed from the widow to Marie Mizwinski had the effect of withdrawing the real estate from the assets against which she could have recourse in collecting her widow's award. The Master found that the deed was valid and the court followed his recommendation and dismissed her petition for want of equity. It is contended, therefore, that at the time the real estate was sold the widow had no interest therein. The widow answers by saying that "one having a claim against an estate of

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which the real estate is in process of partition is not barred by a decree in the partition suit from afterwards asserting her claim against the real estate sold under such decree although she was a party to the partition suit merely as an heir, no question relating to her claim or to the administration of the estate being in issue. Sutton v. Read, 176 Ill. 69." We have examined the case of Sutton v. Read, supra., and are of the opinion that it is not applicable to the facts in the instant case. Here Mary Biernat quitclaimed her entire interest. It cannot be denied that a creditor of an estate has a right to release his or her claim insofar as certain real estate of the deceased is concerned. In the Sutton case the widow was a party but she had not conveyed her interest in the real estate. We are of the opinion that by the deed she conveyed all her interest, including her right to have recourse to the property to satisfy her widow's award. To hold otherwise would be to defeat the purpose of the deed. Her widow's award may nevertheless be enforced against other property. if any.

Finally, appellant urges that a widow's award is a claim prior to the payment of solicitors' fees in a partition proceeding. Section 75, Chapter 3, Ill. Rev. Stat. 1937, provides that a widow residing in this state, of a deceased husband whose estate is administered in this state, "shall, in all cases, in exclusion of all debts, claims, charges, legacies and bequests, except funeral expenses, be allowed as her sole and exclusive property forever, except as herein otherwise provided, the following, to-wit: First - the family pictures and the wearing apparel, jewels and ornaments of herself and her minor children. Second - Such sum of money as the appraisers may deem reasonable for the proper support of herself and his minor children for the period of one year after the death of the testator or intestate, in a manner suited to her condition in life, taking into account the condition of the estate of the testator or intestate."

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Section 71. Chapter 3, Ill. Rev. Stat. 1937, provides that "all demands against the estate of any testator or intestate shall be divided into classes in manner following, to-wit: First. Funeral expenses and necessary cost of administration. Second. The widow's award, if there be a widow; or children, if there are children and no widow. * * ** Appellee urges that "it is equitable that Mary Biernat and other parties be charged with the costs and expenses of the partition suit." The claim of Piast Federal Building and Loan Association was a prior lien to that of any other claim, and the premises had to be sold in order to pay such claim. The Circuit Court had jurisdiction to entertain the partition suit. The attorney's fees allowed were solely for services rendered in the original partition suit and not for services rendered in opposing defendant's intervening petition to set aside the quitolaim deed. No complaint is made that the fees are excessive. It was necessary to file a proceeding in the Probate Court to sell the real estate to pay debts, or to file the instant action in the Circuit Court. The only case cited on the point by either party is that of Little v. Williams, 7 Ill. App. 67, where at page 70, the court said:

"The reasonable and necessary costs and expenses, occasioned by the proceedings to sell real estate, the administrator should have credit for, as said proceedings were at the instance, and for the benefit of appellant."

The law is that in a proceeding (in the Probate Court) to sell real estate to pay debts, the costs and attorneys' fees necessarily incurred therein are properly allowed prior to the widow's award. In logic and equity there is no good reason why the same rule is not applicable to a proceeding to partition in the Circuit Court. It would be unreasonable to hold that the choice of a forum determines whether or not the attorneys' fees have priority over the widow's award. We are satisfied that the court in following the recommendation

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of the Master as to the distribution of the funds, acted in accordance with the law.

appellant points out that there are no assets in the estate other than the real estate. That fact cannot change the law applicable to the situation. The premises were first sold for \$1,800.00. The widow objected, stating that the price was inadequate, and another sale was ordered. At the time set for the second sale, no bid was made. The property was advertised for sale a third time. Plaintiff Warie Wizwinski bid \$1,700.00. The widow made no bid. There is no complaint that the property sold at too low a price.

For the reasons stated, the order of the Circuit Court of Cook County is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

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RACHEL HAYER, et al.,

Appellees,

METROPOLIS THEATRE COMPANY Jet al.

On Appeal of 32 WEST RANDOLEN CORPORATION, SOUTHERN THEATRE PROCENTIES, INC.

CONTINENTAL MATIONAL BANK AND TRUST
COMPANY OF CHICAGO, HENRY M. HENRIKSEN
and JOHN R. THOMPSON JR., Trustees under
the Will of John R. Thompson, Deceased,

Appellants.

APPEAL TROM

INTELLOCUTORY CHOER

OF PIRCUIT COURT

COCK COUNTY.

00 I.A. 611⁵

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is an appeal by 32 West Randolph Corporation,

Southern Theatre Properties, Inc., Continental Rational Bank and

Trust Company of Chicago and Trustees under the will of John R.

Thompson, deceased, from an interlocutory order of the Circuit Court

of Cook County, wherein a receiver was appointed. The opinion

filed concurrently herewith in case No. 40631 is controlling. A

motion was made by appellees to dismiss the appeals of these

three defendants. In our opinion, the rights of the defendants

were affected by the order appointing the receiver. Therefore, the

motion to dismiss the appeals is denied.

For the reasons stated in case No. 40831, the order of the Circuit Court of Cook County is reversed.

ORDER REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

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BISMARCK HOTEL CO., a corporation,

(Plaintiff) An eliant.

JOHN G. MITTEOLD.

(Defendant) Appelled

300 LA. 612

MR. JUSTICE MEARL DELIVERED THE OPINIOR OF THE COURT.

The plaintiff, the Himmarck Hotel Company, a corporation, began an action in the Municipal Court of Chic go on sptember 18. 1937, against the defendant, John G. Mitthold, to recover \$1,795, alleged to be owing by Wittbold as guaranter of the rent payable under a certain lease. The lease in question, which was executed on January 27, 1830, between the Randolph Hotel Company as lessor, (the name of which was changed, as provided by statute, to the Bismarck Hotel, a corporation) and Fittbold Investment Company as lessee. leaged the premisey known as Room 808 Metropolitan Building for a term ending April 30, 1933. This lease was signed by the defe dent Mittbold as president of the Mittbold Investment Company and by him i dividually was a joint guaranter. The statement of claim set forth the balance owing for rent accrued, and alleged that the legger and the defendent refused to pay the amount due upon request. To this statement, the defendant filed his affidavit of merits on October 4, 1937, and admitted the execution of the lease and guarant; The defendent further admitted rout had accrued under the 1 ase, but denied any balance was owing the plemtiff, claiming that the accrued balance had been adjusted and settled with the plaintiff along with the b lances owing under certain other leases. The case was tried before the court and resulted in a finding and judgment for the defendant on July 7, 1938.

The plaintiff subsequently made motions for a new trial and to vacate the judgment, both of which were overruled. It is from this judgment that the plaintiff appeals.

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The defendant suggests that the foundation of the action is not a valid lease, void by reason of its being prohibited under the law, and calls our attention to the lease and urges that the lease on its face imports that it was a lease issued by a corporation under and by virtue of the Corporation Act; that plaintiff's right as lessor to recover was based upon a void instrument and therefore there could be no recovery. The defendant further suggests that where an act is done by a corporation beyond its legal powers the lease is void and of no legal effect. Therefore the question is whether this lease which was executed by the parties is void upon its face.

The lease, of course, is the subject of this litigation, and upon its face appears to be a lease from the Notel Company to the Nittbold Securities Company for space known as Room 808 on the 8th floor of the building known as the Netropolitan Building. From an examination of the lease itself there is nothing which would indicate that the lease is void and is not within the charter powers granted to the plaintiff.

The rule by which the courts are guided in passing upon the question of whether a contract was entered into by a corporation, where the charge is made that the corporation was without power to enter into such contract, and which has been followed in innumerable cases, is that a party who has dealt with a corporation as an existing corporation and has received and used its property under an agreement with it, cannot, in a suit to collect the stipulated sum, be permitted to deny the corporate existence of such corporation. Gilmer Greamery Association v. Quentin, 142 Ill. App. 448. In that case the action was by the plaintiff to recover the amount due for rent, which was due under the terms of a written lease, and as the court has stated in that case:

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"Appellant having dealt with appellee as an existing corporation, and having received and used its property under an agreement with the corporation, cannot, in this suit to collect the agreed rent, be permitted to deny its corporate existence. Board of Education v. Bakewell, 122 Ill. 339; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67."

In American University v. Wood, et al., 216 III. App. 189, this court held that the question whether there is a defect in the organization of a corporation which will prevent it from being a corporation de jure cannot be raised collaterally, but can be presented only in a direct proceeding by information in the nature of a quo warranto.

It has been held by the Supreme Court in the case of Eddleman v. Union County Traction Co., 217 III. 409, that the legal existence of a corporation can be questioned only in a direct proceeding by <u>quo warranto</u>, and not in a proceeding instituted by it to condemn land.

It is well to consider the provision of the revised statute upon the question of the defense of <u>ultra vires</u>. The statute provides in Par. 157.8, Sec. 8, Ch. 32, Corporations, Illinois Revised Stats. 1937.

"No conveyance or transfer by or to a corporation of property, real or personal, of any kind or description, shall be invalid or fail because in making such conveyance or transfer, or in acquiring such property, real or personal, the corporation, its board of directors, or any of its officers acting within the scope of the actual or apparent authority given to them by its board of directors, have in so doing exceeded any of the purposes or powers of the corporation.

No limitation upon the business, purposes, or powers of a corporation, expressed or implied in its articles of incorporation or implied by law, shall be asserted in order to defeat any action at law or in equity between the corporation and a third person or between a shareholder and a third person involving any contract to which the corporation is a party or any right of property or any alleged liability of whatsoever nature; but such limitation may be asserted:

(a) In a proceeding by a shareholder against the corporation to enjoin the doing of unauthorized acts of the transaction or continuation of unauthorized business. If the unauthorized acts or the business sought to be enjoined are being transacted pursuant to any contract to which the corporation is a party, the court may, if all the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing shall allow to the corporation or the other parties, as

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the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained.

(b) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through shareholders in a representative suit, against the officers of directors of the corporation for

1 1/2

exceeding their authority.

(c) In a proceeding by the State, as provided in this Act, to dissolve the corporation, or in a proceeding by the State to enjoin the corporation from the transaction of unauthorized business."

The defendant contends that it was not a lease issued by a corporation existing under the Corporation Act, and therefore the court was justified in ruling as it did. From the authorities we have cited it appears to be the rule, as stated, that the question of the legality of the organization cannot be attacked collaterally, and, for the reasons stated, the question was not one that should have been considered by the trial court.

From the evidence in the record it appears that two contracts were turned over by the Mittbold Securities Company to the plaintiff as collateral security that the Mittbold Securities Company would carry out its contract with the plaintiff, and from an examination of these contracts it appears that the defendant consented to the assignment of the contracts as security to the lessor and was not by such assignment released or discharged of his liability as guaranter.

On Jenuary 31, 1933, Wittbold Securities Company assigned two real estate contracts to the Central Republic Trust Company as trustee under a trust indenture made by the Randolph Hotel Company, which was then in possession of the premises. The contracts were by the terms of the instrument assigned "as security for the payment of any and all rents due and/or to become due * * * to the lessor or its assigns under a certain lease wherein Randolph Hotel Company is lessor and said Wittbold Investment Company is lessee." It appears there was evidence offered by the plaintiff which would indicate that \$20.00

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"The next point is, that taking a new note for fifteen hundred dollars as collateral security for the balance due on the note in suit, and the transfer of the collateral note, before its maturity, to the First National Bank, the note in suit all the time remaining in the possession, custody and control of appellees, and no transfer thereof having been made to the bank, without the knowledge or consent of appellant, discharged her from liability on her guaranty."

The sollateral security in the instant case, as well as the lease, remained in the possession of the plaintiff and was not transferred. Therefore it comes within the rule announced by the upreme Court in the case mentioned above.

There is also complaint in regard to the method of proving the amount due, and it is urged by the defendant that there was lack of evidence for the plaintiff upon this question. However, there was an examination of the books of the plaintiff from which it appeared that the evidence offered was the amount due the plaintiff, and in allowing the figures to be read into the record the court did not err.

The plaintiff points to the fact that the judgment was returned on July 7, 1938 by the court, who heard the evidence without a jury, and later the plaintiff moved for a new trial and to vacate the judgment. Upon consideration of the motions by the court they were denied, and upon the date of the denial of these motions the plaintiff filed its notice of appeal. The point is made by the defendant that the notice of appeal of the plaintiff was not filed within the ninety days, and therefore the court is without jurisdiction to entertain this appeal. This motion by the defendant was made for the first time in the defendant's brief.

was collected on account of the rent due end that the num one applied in reduction of the rent occurs of itsheld wearniss Company. There is nothing in the sestiment voich in any say affected the limitity of the defendent as your nion, and it is well softled that the teking of collected accountry loss not extent a release, Penny v. Vinne real at the case. So ill. eds. The country and in that case:

*The next point is, that taking a new work for tifteen bundred dollars so dollsterd eccurity for the blinds due on the ness in suit, and the transfer of the collateral nois, before its maturity, to the Virst hatton i wank, the nois in self this time remaining in the essession, cuntody and control of appellers, and no transfer thereof naving here wade to the bank, without the knowledge or contact of specient, discharged her from labbility or her surfacely.

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The court in the case of Gillis v. Jurzyna, 284 Ill. App. 174, upon a motion to dismiss the appeal, said:

"Moreover, defendant first asked for a dismissal in his brief filed. The filing of the brief is held to be equivalent to a joinder in error, and by joinder in error the right to move to dismiss the writ is waived. Fread v. Hoag. 132 Ill. App. 233, Finlen v. Fester, 211 Ill. App. 609.

In the case of <u>Connell</u> v. <u>North Town Motor Co.</u>, 297 Ill. App. 247, we in that opinion quote from <u>Finlen</u> v. <u>Foster</u>, 211 Ill. App. 609, the following:

"In actual practice the filing of appellees' brief is held to be equivalent to a joinder in error. Truesdale v. Ford, 40 Ill. 80; DeBeukelser v. Feople, 25 Ill. app. 460; Ferrias v. People, 71 Ill. app. 559; Fread v. Hoss, 132 Ill. app. 233; Medormick v. Higgins, 190 Ill. app. 241; Tobias v. Tobias, 195 Ill. app. 95.

By joining in error appellees waived the right to move to dismiss the appeal. Matson v. Connelly, 24 Ill. 143; Brockway v. Rowley, 66 Ill. 99; Dinet v. People, 73 Ill. 183; Kane v. People, 13 Ill. App. 382; Fread v. Hoag, 132 Ill. App. 233; Kircher v. M. Keating & Sons Co., 145 Ill. App. 1; People v. Rudorf, 149 Ill. App. 215.

so, in the consideration of this question, and in view of the suthorities cited, we are of the opinion that the court has jurisdiction to entertain the appeal taken by the plaintiff, and that the trial court erred in not entering judgment for the plaintiff for \$1,795, the amount established by the evidence. Therefore, the judgment of the trial court is reversed and judgment entered here for \$1,795.

REVERSED AND JUDGMENT HERE.

DENIS E. SULLIVAE, P.J. AND BURKE, J. CONCUR.

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MINIST E. W. LINE P. J. C. C. C. J. C. C. C.

LORAINE MARCOTI,

State of Rhode Island,

(Plaintiff) Appelleg.

L'UNION BAINT-JEAN BAPTISTE D'ANEAIQUE, a Fraternal Beneficiary Society, incorporated unier the laws of the

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

JOOK COUNTY.

 $001.A.612^{1}$

MR. JUSTICE HEBEL DELIVERED THE OFINION OF THE COURT.

This is an appeal from an order entered on October 26, 1938, vacating an order previously entered on July 14, 1938, in which the case had been dismissed for mant of prosecution.

On September 30, 1938, the plaintiff filed a petition in the nature of a writ of error coram nobis. The defendant filed a motion to dismiss the plaintiff's petition, and after a hearing on the motion the court sustained the petition and vacated the order of July 14, 1938. The defendant elected to stand on its motion and has appealed from this order.

The plaintiff in her petition alleges that the case was set for trial before Judge Gridley on the sixth day of July, 1938, and further alleges that on that date the case was Number 64 on the list of cases to be added to the Trial Gall, and that the plaintiff's attorney, Frank C. Leviton, asked Frank Sowa, the Clerk in the court room when the case would be reached for trial. The clerk replied:

"It will not be reached this term, but will go over to the September term because it is too far away to be reached before court closes."

The case continued to be held on Judge Gridley's call, and on July 14, 1938, the case was called for trial and was dismissed for want of prosecution.

The title of the case appeared in the Chicago Law Bulletin Call every day from July 5, 1938, to July 13, 1938, and the issue

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The case continued to be neid on during valley! religions on Auly 1938, the crass on the tries are a distinguished for tries are a distinguished for prosecution.

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of July 13, 1938, showed that the case would be heard on July 14, 1938. The Chicago Law Bulletin of July 14, 1938, showed that the case had been dismissed on that day.

On September 30, 1938, the plaintiff filed her petition in the nature of a writ of error <u>coram nobis</u>. The defendant was given time to answer said petition, and filed a motion to dismiss the plaintiff's petition, and after a hearing on said motion, the court vacated the order of July 14, 1938.

The defendant contends that the plaintiff's attorney was negligent in not watching the trial court's call and noticing that the case had been dismissed, and that there was not such a mistake of fact which could be the basis for a petition in the nature of a writ of coram nobis, for the mistake of fact must be one, which if known, would have prevented the rendition or entry of the judgment.

The plaintiff calls our attention to the abstract of record on the question of negligence of the plaintiff's attorney, where it appears that -

"The said Frank C. Leviton (attorney for the plaintiff) then informed the said Edmund S. Cusmings (attorney for the defendant) of the convergation between the said Frank C. Leviton and Frank Sowa, the clerk assigned to Judge Gridley's courtroom, on the 6th day of July, 1938, and the said Edmind S. Cummings then informed the said Frank C. Leviton that he too was of the opinion that the above entitled cause would not be reached for trial during the month of July, 1938, but would be continued to the September, 1938, term thereof, and that he, the said Edmund S. Cummings paid no further attention to the call of the above entitled cause and did not appear before Judge Gridley on the 14th day of July, A. D. 1938, and, as a matter of fact, did not know that the above entitled cause had been dismissed for want of prosecution until after he had received the September. common law jury calendar, and failing to find the above entitled cause in said calendar, ment to the office of the clerk of the Superior Court of Cook County and ascertained the order of dismissal entered in said cause on the 14th day of July, A. D. 1938."

So that when this cause was dismissed for want of prosecution on the last day of the court term before the summer vacation, neither counsel was present.

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The general rule is that counsel is permitted to rely upon the information given by the clerk of the court as to the state of the court's calendar, and the fact that counsel relied upon such information does not of itself charge the plaintiff with negligence. This rule was followed in the case of Reid v. Chicago Railways Company, et al., 231 Ill. App. 58. It is a fact that had Judge Oridley known on July 14, 1938 that his clerk had given out the information that the case would go over until the following September, the court would not have entered the order that the case be dismissed for want of prosecution. On the contrary the court upon receiving such information would have continued the case to a future date. This rule was also followed in the case of Toth v. Samuel Phillipson & Co., 250 Ill. App. 247.

As we view the facts as they appear in the record we believe the court was justified in setting aside the order dismissing the cause for want of prosecution. The order is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

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3333 WASHINGTON BOULEVIEW BUILDING CORPORATION, a Corporation, JOSEPH SIEGEL and ROCHELLE SIMILL.

(Plaintiffs) Appallants,

INTERLOCUTORY APPEAL

FRO CHAQUIT COURT

R. G. FITCHIE and CLARA B. RUDGETH

(Defendante) Appelies.

300 I.A. 6123

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiffs from an interlocutory order entered February 8, 1939, appointing a receiver pendente lite for the 3333 Washington Boulevard Building Corporation. In this case the plaintiffs sought an injunction restraining the defendants from carrying out certain corporate resolutions which were alleged to be null and void. The application for the appointment of a receiver was made by the defendant, R. G. Fitchie in a petition and counterclaim presented during the hearing on the plaintiffs' motion for a temporary injunction. No evidence was heard by the court.

The plaintiffs filed their complaint on February 6, 1939, seeking a declaration by the court that certain corporate resolutions purported to have been passed by the defendants on February 4, 1939, were null and void, and an injunction restraining the defendants from enforcing or attempting to enforce the resolutions. The resolutions were designed to oust the present management of the plaintiff corporation by the plaintiff, Joseph Sisgel, and to put the defendant, R. G. Fitchie, in charge of the plaintiff corporation's affairs.

The complaint alleges that the plaintiff, 3333 Washington Boulevard Building Corporation, is a corporation duly organized and existing under the laws of the State of Illinois; that the plaintiff, Joseph Siegel, is a stockholder, director, president and treasurer of the plaintiff corporation; and that the plaintiff, Rochelle Siegel.

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is a stockholder of the plaintiff corporation. The complaint sets forth that the corporation was reorganized in a proceeding filed under Section 77-B of the Bankruptcy Act, and that the defendant, R. G. Fitchie, was appointed a member of the Bondholders' Committee oreated under the reorganization plan. The complaint further sets forth that Fitchie, instead of protecting the interests of the bondholders, interferred with the management of the debtor corporation and manipulated the affairs of the debtor corporation in such a manner as to depreciate the value of its bonds to a point where he could and did purchase large quantities of the bonds at a substantial saving.

The complaint further charges that the outstanding bonds of the plaintiff corporation were cancelled and stock issued to the former bondholders; that a special meeting was held of the plaintiff corporation as reorganized, and the plaintiff, Joseph Biegel, and the defendants, R. G. Fitchie and Clara B. Rudolph, were elected directors. A special meeting of the new Board of Directors was held on September 17, 1938, at which meeting the plaintiff Joseph Siegel was elected the president and treasurer, and also employed as manager of the property and affairs of the plaintiff corporation. The complaint sets forth that the plaintiff Joseph Siegel thereupon entered into the management of the property and the affairs of the plaintiff corporation and performed his duties as manager, and that his operation of the plaintiff corporation reflected a substantial profit.

The complaint then charges that a special meeting of the board of directors of the plaintiff corporation was held on February 4, 1939; that at that time the defendant, Clara B. Rudolph, was not a stockholder of the plaintiff corporation, and therefore not qualified to act as a director of the corporation at the meeting, but did cast, what the defendants claimed to be the deciding vote

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upon each of the resolutions presented at the meeting. On the day the complaint was filed, February 6, 1939, a notice was served on the defendants that the plaintiffs would, on the following day, February 7, 1939, move the court for the issuance of a temporary injunction. Plaintiffs' motion for a temporary injunction was presented on February 7, and a hearing thereon was had and continued to February 8, 1939. On the afternoon of February 7, 1939, the defendants attorneys served the plaintiffs with notice that they would on the following day present the verified petition of R. G. Fitchie asking that leave be given the defendants to file a crosscomplaint within a reasonable time to be fixed by the court, and also asking for the appointment of a receiver for the plaintiff cor-Upon receipt of this notice the plaintiffs served notice that they would move the court on February 8, 1939, for the dismissal of their complaint and the case without prejudice. Upon the hearing of plaintiffs' motion for a temporary injunction on February 8, 1939, counsel for the defendants presented the petition of the defendant Fitchie and a cross-complaint signed and sworn to by the same defendant on February 8, 1939, and asked leave to file instanted the cross-complaint of Fitchie, as well as the petition described in the notice served on the previous day. The plaintiffs then made the following alternative motions: (1) For the dismissal of their complaint and this cause without prejudice, (2) for an immediate ruling on their motion for a temporary injunction, and (3) for a dismissal of their complaint for want of equity. The court continued the plaintiffs' motion for an immediate ruling on their motion for a temporary injunction and denied the plaintiffs' motion for dismissal of the case without prejudice and for dismissal of the case for want of equity. The court at said time granted the defendant R. G. Fitchie leave to file instanter his petition and cross-complaint,

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and that the cross-complaint stand as an answer to the complaint filed by the plaintiffs, and the court in the same order appointed George Dubin receiver of the plaintiff corporation, and directed him to take immediate charge and possession of the real estate, as well as all the property of the plaintiff corporation and to manage and operate said properties.

The cross-complaint of the defendant R. G. Fitchie alleges that he is a stockholder and duly elected and qualified director of the plaintiff corporation; that on February 4, 1939, a special meeting of the board of directors of the corporation was held, at which time the entire board was present and various resolutions were adopted terminating the management of Joseph Siegel and directing that all compensation to him cease immediately; that at this meeting Joseph Siegel, president, and one of the plaintiffs herein, declared that none of the resolutions adopted at the special meeting were valid for the reason that in his opinion said Clara R. Rudolph was not a proper director, and that at the meeting Joseph Siegel stated he would not surrender possession of the premises and would not abide by the resolutions ousting him as manager. It is further alleged that unless the court, by its proper officers, takes possession of all the assets of the corporation, and its books and records, including stock records, until the issues herein are determined or until a special meeting of the stockholders is held, irreparable damage will be caused and the assets of the corporation will be wasted and dissipated.

It is further alleged that the contract purported to be entered into between the corporation and Joseph Siegel, engaging him as a manager for five years with compensation of \$65. per week, plus an apartment, or in the event the apartment is not occupied by him its equivalent in cash payable weekly as a salary, be

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immediately cancelled and determined. Therefore the prayer of the cross-complaint is that an order be entered terminating and immediately canceling the management contract purported to be entered into between the plaintiff corporation and Joseph Siegel; that all acts of the board of directors at its special meeting on February 4, 1939 be declared valid, and that the resolutions adopted by the Board of directors at its special meeting be given full force and effect, and that if in the opinion of the court the best interests of the estate will be served, a special meeting of the stockholders shall be called under the supervision of the court, and that pendente lite, a manager or receiver be appointed by the court, with the usual powers of receivers in chancery, to take charge of the business affairs and the management of the property owned by the plaintiff corporation and located at 3333 Washington Boulevard, Chicago, Illinois, known as the "Chatfield Hotel". So that upon an examination of the order entered by the court, it appears:

Thereupon the court ordered that George Dubin be and he was appointed receiver to take immediate charge and possession of the real estate in question, and all of the property belonging to the corporation, including the books of account and corporate records, and he was empowered to operate, manage and lease said real estate, to employ assistants, make necessary purchases and such disbursements as were necessary and requisite in the operation and management of the hotel. It was further provided that George Dubin file his receiver's bond in the sum of \$5,000 within ten days, and that R. G. Fitchie file his cross-plaintiff's bond in the sum of \$200 within the same period-of time.

^{*1.} That the defendant R. G. Fitchie be and he is hereby granted leave to file instanter his petition and cross-complaint and said cross-complaint to stand as well as the answer of R. G. Fitchie to the complaint herein.

^{2.} That the motion of the plaintiff herein to dismiss the complaint herein be and the same is hereby denied."

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The complaint charges that the only allegations in the crosscomplaint pretending to state any grounds for the appointment of a receiver are found in paragraph 5 thereof, which reads as follows:

"5. That unless this court, by and through its proper officers, takes possession of all of the assets of the plaintiff corporation and all of its books and records, including stock records, until the issues herein are determined or until a special meeting of the stockholders is held under the supervision of this court, irreparable damage will be caused and the assets of said corporation will be wasted and dissipated."

and the plaintiffs call the attention of the court to the fact that in the petition or cross-complaint of Fitchie there is no allegation that the plaintiff corporation was insolvent or in danger of becoming insolvent; that there is no charge in the petition or cross-complaint that the plaintiff corporation had been or was being mismanaged or that its assets were being masted or dissipated; so that we quite agree with the suggestion of the plaintiff that the interlocutory order must stand or fall upon the pleadings as they existed at the time the order was entered, and we have indicated in our opinion the proceedings as they occurred prior to the date when the appeal was taken by the plaintiffs.

In a discussion of the merits of the controversy, Section 86 of the Business Corporation Act of 1933 (1937 Ill. Rev. St. Ch. 32, Par. 157.86, Sec. 86,) now gives courts of equity power to liquidate corporations and to appoint receivers upon the suit of a shareholder. The provision of the act that is pertinent is as follows:

(2) That the acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent; or

(3) That the corporate assets are being misapplied or wasted."

From an examination of the cross-complaint filed by leave of court in which the cross-complaint applies for the appointment of a receiver, there is no allegation of fact which would indicate the necessity for the appointment of a receiver. There is no

[&]quot;(1) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or

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allegation of fact charging that the corporate affairs or its assets were being misapplied or wasted; in fact the only alleg tion that is made - and which is but a conclusion - is based largely upon certain resolutions passed by the board of directors, which, as we have previously indicated, do not show that the assets of the corporation were being dissipated. We are of the opinion there is not sufficient justification for the appointment of a receiver based upon the allegations in the cross-complaint filed by the cross-complainant R. G. Fitchie, and for that reason we think the court erred in entering the order appointing a receiver. The order appointing a receiver is reversed.

ORDER REVENSED.

DIRIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

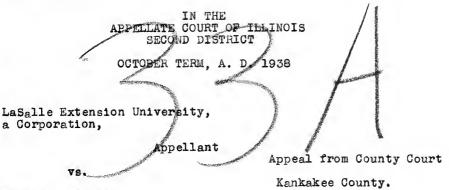
Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:





Thomas E. Tucker,

Appellee.

HUFFMAN - J.

Appellee, on January 31, 1935, signed what is designated as an Application for Membership in the Department of Higher Accountancy in appellant corporation. The down payment provided for in the application for enrollment was changed from \$50 to \$30, and the monthly payments were changed from \$15 to \$6. It was provided therein that the monthly payments should be due and payable on the 20th day of each month. At the time of signing the application for membership enrollment, appellee also signed a note in the sum of \$130, payable to appellant, evidencing the balance due upon his application for membership. This note provided that it was to be paid to appellant in monthly installments of \$6 each, payable on the 20th day of each month, beginning with March 20, 1935, until paid.

When the first shipment of books was received by appellee, he returned them to appellant without opening. This was soon after the contract and note were signed. Later, and in the month of July following, he received a similar package of books from appellant, which he likewise returned without opening. He states that the books were transmitted by mail and that the postage was about twenty-two cents. This constituted all of the transactions between the parties. After maturity of the note, appellant sued appellee in a

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HUFFMAN - J.

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an Application for assumption. The down appeals of the soft appellant componition. The down appeals to 20, and the application for enrollment are alleged from 120 to 30, and the monthly payments were allenged from 116 to 46. It was provided therein that the northly payments alread be due and payable on the 20th day of each morth. At the time of signine the application for membership enrollment, appelles also algued a note in the sum of \$150, payable to appellant, evidencing the balance due upon his application for membership. This note provided that it was to be yeard to appellant in monthly installments if 48 sech, payable on the 20th day of each monthly installments if 48 sech, payable on the 20th day of each monthly installments if 48 sech, payable on

When the first sulpment of books was reselved by appolled, he returned them to appellant without opening. This was soon after the contract and note were signed. Later, and in the morth of July following, he received a similar package of books from appellant, which he likewise returned without opening. He states that the books were transmitted by mail and that the postage was about twenty-two cents. This constituted all of the transactions between the parties. After maturity of the note, appellant sued appellee in a

Justice of the Peace court, where it recovered a judgment against him for \$130, which was the principal sum named in the note.

Appellee prosecuted an appeal from that judgment to the county court of Kankakee County, where the case was tried by jury and the jury found the issues for the defendant (appellee). Appellant prosecutes this appeal from the judgment of the court entered on the verdict.

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In the trial of the case in the county court, appellant called as its only witness, the appellee. He testified that he signed the note in question; that the books received by him were returned; that at a later date they were against sent to him and again returned to appellant: that he received nothing in the way of physical property. books or lesson sheets, which he retained; that he could not state what books were contained in the packages received, as he did not open them. This constituted appellant's testimony. The note was introduced in evidence and appellant rested its case. The appellee then took the witness stand on his own behalf. He introduced in evidence the application for membership in appellant corporation in the Department of Higher Accountancy. This instrument is too long to incorporate in this opinion. Appellee testified that appellant's Salesman, Eggen, was the person who secured his application for membership; that he had seen appellant's advertising in the magazines; that one package of books was received soon after the signing of the note and application for membership; that he immediately returned this package unopened; that later in the summer, he received another package similar to the first, which he returned to appellant unopened. He states that the foregoing constituted the extent of the transactions between him and appellant.

It is insisted by appellant that this suit is based entirely upon the note; that it has nothing to do with the application for membership or enrollment; that they were independent promises; and that the court erred in refusing to instruct the jury to find for appellant. It is insisted by appellee that the suit is based upon the application for membership in the Department of Higher Accountancy

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walf, rolled to the control of the end of fairt out al as its only vibness, the regulable. He certified the education of the note in question; that the cooks sections of the cooks are the cooks are the cooks and the cooks are the cooks at a later date they when applicat relating the age in actualist for appellant; there he received naturally on also who of places of responds, books or lerach speets, which he reterred: the complicingt group when books were contained in the rankages recolored, es a child not open them. This constituted in ellent's tent'mony. In this wife introduced in evidence and expedient served has a continued in a like then took the wathage stand or his byr scholf. Is introduced by evidence the application for memberghing in consument corporation in the Department of Higher Accountancy. This instrument is too long to incorporate in this opinion. Aprelles testified that appellant's Salessan, Wheen, was the person who secured his application for membergain; that he had seen eppellant's advertising in the magazines; that one package of books was received soon after the signing of the note and application for membership; that he immediately returned this package unopened; that later in the summer, he received another package similar to the first, which he returned to appellant unopened. He states that the foresoing constituted the extent of the transactions between him and go rellant.

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in appellant corporation; that the note is but an incident to the enrollment contract and that the measure of damages to which appellant is entitled, is limited to the loss sustained by it because of appellee's breach thereof.

Appellant cites the case of the International Text Book Co. v. Martin, 220 Mass. 1, 108 N.E. 469, in support of its position that the promises between appellant and appellee were independent promises and therefore the promissor must perform his promise and bring crossaction if the other party fails to perform. In that case, a minor son enrolled with the plaintiff for a course of instruction in telephone engineering. The father signed a guaranty to the effect that the price agreed to be paid for the course of instruction would be paid according to the terms of the subscription agreement. Suit was brought on the guaranty to recover the unpaid installments, which amounted to \$53.40. The father admitted that he read the contract between the plaintiff and his son, and that the same was by the terms of the guaranty incorporated into the guaranty contract. Two defenses were set up; First, that the son was not in default in the payment of installments due, and second, that misrepresentations were made by the agent of the plaintiff when the contract was signed by the son.

The action was by the plaintiff against the father to recover the balance due on a written contract between plaintiff and the defendant's minor son, which contract the defendant had guaranteed in writing. The court in that ease held the promise to furnish the instruction and the promise to pay therefor, to be independent and not dependent promises, and permitted recovery against the father for payments remaining due the plaintiff. It is there recognized that in case of dependent promises, a party to an executory contract may stop performance by the other party either by explicit directions or renunciation and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract. The rule with reference to independent promises as followed in that

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case is taken from notes to Prodage v. Cole, 1 Saunders, 319,320, and 1s announced as follows: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent." This rule has been recognized in the case of Powers Reg. Co. v. Hoffman, 169 Ill. App. 657, 660.

It is also urged by appellant that the fact the defendant changed his mind after enrolling for the course of instruction, and refused to proceed therewith, is no defense against his liability to pay the full amount of the contract, and in this connection reference is made to the case of Moore v. LaSalle Extension University, 146 Okla. 88. In that case the defendant enrolled in appellant institution for a course of instruction in traffic management. Suit was instituted upon the note signed by the defendant. Defendant denied liability, claiming that he had an understanding with the plaintiff's agent that the agent would hold all papers connected with the transaction until after the defendant had had an opportunity to examine same and to determine if he wished to pursue such course; and that upon examination of the books and papers to be sent him, if the defendant decided that he did not wish to pursue the course, that the agent agreed the deal would be off and that his note and the other papers would be returned to him. The agent did not so retain the enrollment application and note, but forwarded them to the plaintiff, whereupon certain books and consignments of lessons and instruction material were sent to the defendant. Following that, the defendant had correspondence with the plaintiff to the effect that he had no time to study and that he was returning the books and other material. After some correspondence and by consent of the defendant, the books and papers were returned to him.

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of the first of the first of the state of the state of the forth and the first of the state of t to proceed the areas is, as as defined a constitution of the proceed to full amount of the correctly all an are a start of the correctly the case of the control of the contr In that once the definition are the common of the contract of the first course of ingrecotic section of the land and a line in were instituted upon the norr eigned of the defenier. Larred a Conicd liability, claiming that he had no understanding with a soulnintiff's agent that the agent would hold salk papers comessed with the transaction until siter the defendant had had an opportunity to enswing some and to determine if he witched to pursue such course; and that upon exemination of the books and espens to be sent him, if a a defendent medical that he did not wish to manus the course, that the great screed the deal would be off and that his note and the one papers would be returned to him. The agent dud not so retain the enrollment application and note, but forwarded them to the plaintiff, whereapen certain books and consignments of leasons and instruction meterial wars saut to the defendant. Following that, the defendant had correst andence with the plaintiff to the effect that he had no time to atudy and that he was returning the books and other material. After some correscondence and by consent of the defendant, the books and papers were returned to him.

Following this, the defendant continued with the contract, making subsequent payments until he had received forty-four out of the forty-seven consignments of lessons and instruction material which were to be sent him. The court in its opinion states that the only defense was that there was no delivery of the note by the defendant to plaintiff. It appears that although the defendant did return the books, yet upon his consent they were again shipped to him, and that he continued the course of instruction under the contract, receiving forty-four out of a total of forty-seven lessons which were to be furnished him. The three remaining consignments of lessons were all that remained for the plaintiff to do in order to complete the contract. The plaintiff did not make the final renunciation of his contract until after he had received the forty-fourth consignment of lessons and instruction material. With reference to this situation, the court states: "The defendant received the initial and complete first installment of books, instructions, etc., about the middle of May, 1925, and at regular intervals thereafter he received similar consignments without protest, other than as noted hereinbefore. up until April 5, 1926, at which time forty-four out of forty-seven consignments had been sent to and retained by defendant. The remainder were subject to his call. These articles were not returned until July, 1926." The court found that the acceptance by defendant of the performance of the contract by the plaintiff and the unexplained retention by him of the material sent, for such a length of time, precluded his defense made. And in conclusion, the court states; "Defendant's whole defense rested upon his right to examine the books, etc., sent to him by plaintiff, and decide then whether or not he would go forward with the contract. His subsequent decision to abide by the contract, his payment thereon, and his long acceptance of the benefits, would seem to strike down his defense and make the same now unavailable."

It is held in International Text Book Co. v. Jones, 166 Mich. 86, 88, that a party to an executory contract may stop the performance thereof by the other party by explicit direction or by renunciation

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thereof and the refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract. To the same effect are the cases of International Text Book Co. v. Marvin, 166 Mich. 660, 668; International Text Book Co. v. Roberts, 168 Mich. 501, 506; International Text Book Co. v. Schulte, 151 Mich. 149.

It is generally considered that where one of the parties to an executory contract repudiates it before its performance is finished, either by notice of recission or by refusal of further performance, without adequate cause, the other party thereupon has a right of action for all such damages as he may have sustained by reason of such recission or abandonment. It is also a general rule in the construction of contracts, that two contemporaneous writings, where they are between the same parties, relate to the same subject matter, are mutually dependent, and constitute in fact but one contract, may be construed and considered together in actions between the parties. This rule has been frequently applied in the case of a note and a contemporaneous agreement in writing, such agreement being construed as a part of the same contract for the purpose of explaining or controlling the terms of the former. Such cases are generally where the agreement constituted the consideration for which the note was given. It would appear in this case that the enrollment or membership agreement constituted the consideration for the note given. They are so mutually connected with each other, as to in fact comprise but one transaction between the parties. The note was but an incident of the enrollment contract and would not have arisen except for same. We do not consider them subject to the rule applied to independent promises.

Appellant offered no proof of damages based upon appellee's renunciation of his contract, but based its claim for recovery solely upon the note. There were no pleadings in the case and this court must take the record as it finds it. The application for membership

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Appellant offered no proof of damages based upon appellant renunciation of his contract, but based its claim for recovery solely upon the note. There were no pleadings in the cover and this court must take the record as it finds it. The application for membership

set out in detail the price of the course of instruction and the manner in which the same was to be paid. The note merely evidenced the unpaid balance appearing due in the application, and provided for payment thereof in the same manner as set out therein.

Appellee repudiated his contract upon receipt of the first shipment of books and material from appellant. He returned each shipment immediately upon receipt of same. After return of the second shipment, appellant took no further steps with respect to appellee's course of instruction. Appellant offered no proof of damages based upon defendant's renunciation of his agreement. It does not assign error upon its failure to have awarded to it such damages as might have flowed from the appellee's refusal to proceed with his contract, and such point is not argued in this court. Therefore, this court has not considered the question of nominal ax damages.

We are of the opinion the judgment of the county court is right.

Judgment affirmed.

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SECOND DISTRICT	ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
said Second District of	the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
	a true copy of the opinion of the said Appellate Court in the above entitled cause.
record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court. at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty
	Clerk of the Appellate Court
73815—5M—3-32)	



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon: FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

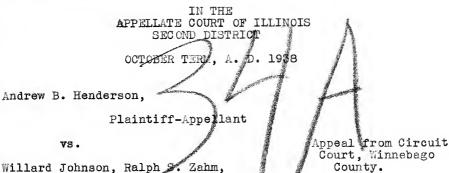
Hon. BLAINE HUFFMAN, Justice \$ 0 0 I.A. 6 1 3

JUSTUS L. JOHNSON, Clerk RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On 24 25 1323 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:



Ag. No. 19



VS.

Willard Johnson, Ralph S. Zahm, Guardian ad Litem for said Willard Johnson, a Minor, et al.,

Defendants-Appellees.

WOLFE, J.

An automobile which was being driven on Fifteenth Avenue in the City of Rockford, Illinois, by O. T. Henderson, Jr., in which the plaintiff. Andrew B. Henderson was riding as a guest, collided with the car of Emil Johnson, being driven by his agent, Willard Johnson, the defendant, and the plaintiff was injured. The plaintiff started a suit against the defendants in the Circuit Court of Winnebago County, and alleged in the first two counts of his petition, that just prior thereto, and at the time of the collision, he was in the exercise of ordinary care for his own safety, but on account of the negligent manner in which the defendant, through his agent, operated his car, the plaintiff sustained injuries.

The third count of the petition alleges the physical facts to be the same, as in prior counts, and then charges the defendants, "Did wilfully, wantonly and maliciously drive, operate and manage the automobile of Emil Johnson, defendant, at a high rate of speed to-wit: thirty-five to forty miles per hour directly at and towards the automobile in which the plaintiff was then and there riding and which said automobile was in plain view of the defendant, Emil Johnson by his agent, Willard Johnson and in plain view of the Defendant Willard Johnson, and in such a location that the defendants, either by

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WOLVE, J.

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The triple count of the petition alies of a payment frets to be the same, so it rior counts, and them of the last as alfeldit, white my and malifeldity arive, operate and manage the sutemobile of Emil Johnson, defendant, at a bign rate of speed to-wite thirty-five to fort, ales per hour directly so an lowerds the automobile in which the plaintiff was then and there riding and which his agent, Wail Johnson and in plain view of the defendant, Wail Johnson by Johnson, and in such a location that the defendants, either by

themselves or their agent, saw the automobile containing the plaintiff, or by the exercise of ordinary care, could and should have seen said automobile containing the plaintiff in ample time to have prevented a collision between the automobile of Emil Johnson, defendant." The plaintiff further avers that said defendants by their agent and by themselves wilfully, wantonly and maliciously drove the automobile of Emil Johnson, the defendant, directly at and against the automobile containing the plaintiff.

To this petition, the defendants filed an answer denying all the material allegations of negligence and wilful and wanton conduct on the part of the defendants, and charge that the accident occurred on account of the contributory negligence of the plaintiff.

The case was tried before a jury. At the close of all the evidence, the defendants entered a motion to withdraw the third count of the complainant from the consideration of the jury. This motion was sustained, and the third count was dismissed. The jury found the issues for the defendant. Judgment was entered on the verdict, and it is from this judgment that this appeal is brought.

First, it is insisted that the Court erred in withdrawing the 'wilful and wanton count' of the plaintiff's petition from the consideration of the jury. This count charged that the defendant wilfully and wantonly drove his car at the rate of speed of thirty-five to forty miles per hour, and ran into the car, which the plaintiff was driving. So far as the abstract shows, the sufficiency of the petition was not challenged, but the defendants filed a general denial of each charge, and went to trial upon that issue. Mr. Andrew B. Henderson, in his testimony, stated that when he saw the automobile of the defendant coming from the north, it was seventy-five or eighty feet away, and was going between thirty-five and forty miles per hour, and from the time it entered the intersection, he did not notice any change in the speed of the automobile. Here was positive testimony to sustain the third count of the plaintiff's petition. There is other testimony in the record sustaining the third count, namely,

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First, is is included that the determined in withdrawing the 'wilful and members count' of the plaintiffer redition from the consideration of the jury. This event carryed that the defendant wilfully sad white ly draw his constituted of the rate of speed of thirty-five to forty miles par boar, and ran into she of, anich the plaintiff was driving. So for as the electron chows, the sufficiency of the petition was not or lienged, but the defendant filed a general denied of each charge, and went to trial upon that issue. Mr. Andrew E. Renderson, in his testimony, stated that when he say the automobile of the defendant coming from the north, it was seventy-five or eighty feet away, and was going between thirty-five and forty miles per hour, and from the time it entered the intersection, he did not notice any change in the speed of the automobile. Here was positive testimony to sustain the third count of the plaintiff's retition. There is

that there was no obstruction of any kind to prevent the defendants from seeing the plaintiff for a short time before their car entered the intersection, up to and at the very moment of the collision. This testimony, if taken alone, would be sufficient to sustain the third count of the plaintiff's petition, and the same should have been presented to the jury for consideration.

The defendant's instruction No. 6, given by the Court, is as follows to-wit: "6. The Court instructs the jury that at the time of the happening of the accident in question there was in force and effect a statute of the State of Illinois as follows: -- "Chapter 165, Paragraph 68: Vehicles approaching or entering intersection. Except as hereinafter provided, motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left." You are further instructed that if you believe from a preponderance of the evidence in this case, that the defendant, at the time and place in question, was entitlted to the right of way over the automobile in which the plaintiff was riding, and that the proximate cause of the collision was the failure of the driver of the automobile, in which the plaintiff was riding, to accord to the defendant the right of way, then you shall find the defendant not guilty."

This form of instruction has repeatedly been criticized both by our Supreme Court and all of our Appellate Courts. It would seem clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across the intersection

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This form of instruction has remeated to see writinized both by our Supreme Gourt and all of our Appellace Courts. It would seem clear that the statue does not mean that the aright of a vehicle approaching an intermodian must yield the right of way to one approaching the committee that vehicle may be from the intermedian report to the distance that vehicle may be from the intermedian or when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle engroupes an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across to a intersection

before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one "approaching from the right" within the meaning of the statute, and so as to require such driver to stop or yield the right of way. Riddle vs. Mansager 254, Ap., 68, Munns vs. City of Chicago Railway Co., 235 App., 160; Swartz vs. Lindquist 251, Ill. App., 320.

The Appellee, in his brief, cites many cases to support his contention that the instructions will be considered as a series, and that if all the instructions taken together state the law applicable to the case, the judgment appealed from, should be affirmed. This is a correct statement of the law, but it does not apply when an erroneous instruction directs a verdict. An erroneous instruction that directs a verdict cannot be cured by another instruction that properly states the law. The defendant's instruction number 6, was erroneous, and should not have been given. The Court refused to give instruction number 2, and 5, xx for the plaintiff. We have examined these two refused instructions, and we think they properly set forth the law as therein stated.

The judgment of the Circuit Court of Winnebago County is hereby reversed and the case remanded for a new trial.

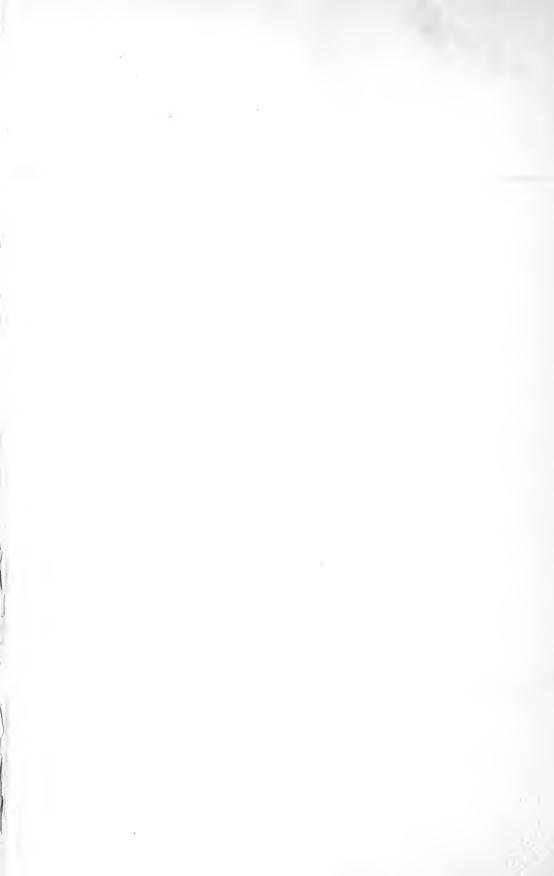
Reversed and Remanded.

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PATE OF ILLINOIS,	ss. I. JUSTUS L. JOHNSON, Clerk of the Appellate Court. in and
	the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
tify that the foregoing is	a true copy of the opinion of the said Appellate Court in the above entitled cause.
record in my office.	T. M. C. When I hereupte get my hand and affix the seal of said
	In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this
	in the year of our Lord one thousand nine
	hundred and thirty
	Clerk of the Appellate Court
3815—5 M—3-32)	,



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

300 I.A. 6132

BE IT REMEMBERED, that afterwards, to-wit: On the Cpinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:



In the Appellate Court of Illingis

Decond District

October Term, A. Z. 1908.

Ella O'Brien, Della Loraro, Frances Eramer Mauricau and Emes Lramer, (Plaintiffs) Appolities,

vs.

Henry W. Vess, James Luster, Josephine Maly, Clifford Lindsey, Bessie Turner, Willis J. Loodward, Clara Marvin, Tred Austin, Frank Borella, Lorotta Galligan, Charles Lindquist, Mrs. George Barras, Charles Russ, Morace Barnes, Philip Raiser, John P. Danwerk Jerome Stewart, James Morgan, W. H. Lennon, May Hurley, (Nelle A. Leary Dillon, as dainistratrix of the Estate of James Shields, Deceased, Appellant), William M. Knutson, Receiver of Will County National Bank of Joliet, Illinois, now in liquidation, George Schoettes, Thomas H. Radigan, Margaret Duggan, Patrick W. Fitzgerald, Margaret McFarland and J. Bert Backburn, Acting Accorder of Deeds of Will County, Illinois, success r in Trust to George J. Clare, Deceased,

(Defendants.)

appeal from the Circuit Court of Will County, Illinois

WOLFE, J.

and during the years from 19 26 to 1930, and prior thereto, engaged in the business of loaning money. It secured its loans by trust deed on real estate. A borrower of the firm's money executed a promissory note, or notes for the amount of the loan and conveyed his real estate as security by trust deed to George J. Clare. In some such transactions, as above indicated, the loan, or debt was evidenced by notes of different amounts, all of which equalled the amount of the loan. The firm cold and delivered its notes, thus acquired, to its customers, kept a record of the purchasers of the notes, collected the interest when due, and paid it to the holder of each note, as therein stipulated. As a usual practice, the firm credited the interest paid on the back of such note.



Said George J. Clare, an attorney at law, examined the abstracts of title to the real estate offered as security for loans, decided upon the advisebility of making loans, and was (in a word), the head of the firm. He died before the hearing of the evidence in the case at bar. William F. Lowrey, Br., who remained as the office manager of the firm after Mr. Clare's death, was a witness in the case. Mr. Lowrey's duties as office manager during the time in question were of a clerical nature, such as selling notes of the firm, receiving payments of interest, crediting the payments and distributing the interest to the holders of the notes on which interest had been paid.

On February 23, 1928, the firm of h. H. Clare and Company loaned \$10,000.00 to Henry .. Voss. oss and his wife executed on that date, fifteen promissory notes payable to their order four years after date; five of said notes being for \$1,000.00 and ten of the notes being for .500.00, with interest at six per cent payable semi-annually, at the office of J. V. Spare and Company. All the notes were endorsed by the makers and delivered to b. 1'. Clare and Company. To secure the notes, Voss and his wife conveyed three tracts of land in Joliet, known in the record here as tracts A, B and C, by trust deed to George J. Clare, trustee. The trust deed recites that "the property thirdly above described" (being tract A) "is subject to a certain trust deed dated July 3, 1903, recorded in Book 602 page 10, and is taken in this trust deed simply as additional security." The trust deed of July 2, 1983, to George J. Clare, trustee, secured a debt of \$8,000.00. The trust deed of February 23, 1925, was duly recorded in the office of the Recorder of Will County on the same day W. H. Clare and Company sold the notes secured by this trust deed, to its customers, retained possession of the trust deed, and acted as agent of the purchasers of the notes in the usual course of its business, as above stated. The names of the persons who bought these notes, and the date of purchase, does not

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on July 7, 1988, Voss and his wife signed and delivered to W. H. Clare and Company, their seventeen promissory notes, of that date, due in five years, totalling \$13,000.00. Hims of the notes being for \$1,000.00 and eight for \$500.00. To secure the notes, Voss and his wife executed a trust deed of that date, conveying to George J. Clare, trustee, said parcels of land known as tracts A, B and C. This trust deed recites, "Out of the money hereby secured, the grantors governent to pay and discharge a certain trust deed dated July 2, 1933, recorded in Book 603, page 10, which was made forthe principal sum of \$8,000.00."

It also appears that after the trust deed of July 7, 1928, was executed, there was paid a series of four notes of Voss's totalling \$4,500.00, exclusive of interest thereon, which were payable to the Mokena State Bank. These notes evidenced loans which Voss received from the bank at different times. The notes were secured by a trust deed made on October 22, 1927, on tracts A, B and C to one Milton C. Geuther, trustee, for \$10,000.00 as blanket security for loans which Voss might receive from the bank from time to time. The trust deed to Geuther was released and discharged of record on July 9, 1988. Voss left the transaction of his financial affairs in charge of George 7. Clare. It is our conclusion that the object of the trust deed of July 7, 1928, and the notes thereby secured, was to consolidate the two debts of Yoss of \$8,000.00 and \$4,500.00.

On August 33, 1930, six months before the notes secured by the trust deed of February 23, 1926, were due and on an interest paying date thereof, Vosa and his wife executed thirteen promissory notes payable to their order five years after date. Heven of the notes being for \$1,000.00 each, six for \$500.00 each, with principal and interest, at six per cent, payableat the office of . H. Clare and Company. The notes were endorsed by the makers. To secure the notes,

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or the total debt evidenced by the notes, Yors and his wife executed a trust deed, on that date, to Jeorge J. Clare, trustee, on tracts A, B and C. Thetrust deeds of 1926 and 1930, are substantially the same. The trust deed of sugast 23, 1930, recitos: "Troperty thirdly described" (tract A) "being subject to a trust deed for \$15,000.00 dated July 7, 1928, and recorded in Book 705, page 97." The trust deed of August 23, 1930, was recorded on August 26, 1930. The trust deed dated February 23, 1926, has never been released on the records in the Recorder's office of Aill County.

W. H. Clare and Company sold the seventeen notes secured by the trust deed of July 7, 1928, and the holders are: George Schoettes, Ella O'Brien, Bella Larkin, Thos. H. Endigan, Margaret Duggan, P. W. Fitzgerald, F. K. Mauricau, Arnes Kramer and Margaret McFarland. The notes secured by the trust deed of Aurust 23, 1930, are held by the following persons: L. H. Lennon, three notes for \$1,000.00 each; George Schoettes, one note for \$1,000.00; May Hurley, three notes for \$1,000.00 each and one note for \$500.00; F. . Fitzgerald, four notes for \$500.00 each; James Chield's astate, one note for \$500.00.

by the trust deed of July 7, 1928, and George J. Clare, trustee, filed in the Circuit Court of Will County, their complaint to foreclose that trust deed. Voss and his wife, the tenants in possession of the tracts, W. B. Lennon, May Murley and James Chields, holders of the notes of the 1930 series, were made defendants to the complaint, which is in the usual form and alleges that the trust deed of August 93, 1950, is subject, junior and subordinate and inferior to the trust deed of July 7, 1928. Our attention is directed by counsel for the holders of the notes secured by the trust deed of July 7, 1928, to the fact that the complaint is verified by the affidavit of Milliam P. Lowrey, Sr., office manager for W. H. Clare and Company. Then the bill was

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filed, George J. Clare was living. Add counsel, also calls attention to the fact that James Maiolds, the administratrix of whose estate appears here as sole appallant, filed his written entry of appearance and consented that immediate default might be taken mainst him in the above foreclosure suit.

The above named Deorge Tchoettes is the owner of three notes for \$1,000.00 each secured by the trust doed of July 7, 1938, and the owner of one note for \$1,000.00 secured by the trust deed of 1930. On November 10, 1937, Seorge Schoettes, and Thomas N.

Radigan, Margaret Suggan and Margaret NeFarland, holders of notes secured by the trust deed of 1923, upon their motion, were dismissed as parties plaintiff to the above foreclosure complaint, and make parties defendants thereto, with leave to file an answer and crossbill to the original complaint. Thereupon, they filed their answer and crossbill which is in substance to the effect that the trust deed of February 23, 1928, has not been released of record, although the notes thereby secured, had been fully paid; and that the court should order a formal release of the trust deed of February 25, 1926.

Upon motion of James Chields, the cross-complaint was stricken. On December 13, 1937, leave was granted by the court to plaintiffs, to file an emended complaint. Alta O'Brien, Della Larkin, Frances Kramer, F. K. Mauricau and Agnes Kramer, remaining plaintiffs in the original complaint, filed an amended complaint to foreclose the trust deed dated July 7, 1928. Allegations of the amended complaint so far as material to the question raised in this court are as follows: That the trust deed dated July 7, 1943, was duly executed and recorded; that before the trust deed of 1938 was recorded, tracts A, B and C were encumbered by a trust deed dated February 25, 1936, to secure notes for \$10,000.00, said trust deed of 1926 being a first lien on tracts B and C and a second lien on tract A. That on August 23, 1930, Voss and his wife executed a

illed, so "che beli don the t s alm no obside nppe are . . to to Continue e de la colonia to the said ban TOUR LEVEL TO THE TAX A STORY TO Red I had A COURSE CONTRACTOR e , a second blackers of thing The state of the s LA SEL -CLUB, WE or the second of the page the note. See .. Laura Elwada and the state of t es established and the second , at we rounded the train a subsering that a grandstitted in course do by the way to be a course of whiteholds formoion furtire, a death and duly T, it is the form the fall course of the conference configurations gourt act to the same and the same of the daly expontes and best of the rocorded, tracta, the court that the court to Represent to a location of the second of the second of 1020 old and a first of the party of the court of the

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mentioned notes were obtained by the holders the cof, by the surrender of the notes described, the payment of which was secured by the trust deed deted February 23, 1926; that the notes secured by the trust deed of February 23, 1930, were exchanded by the holders therefor, for the notes secured by the trust deed of wrust 33, 1930; that February the notes secured by the trust deed of wrust 33, 1930, and the notes secured by the trust deed of wrust 33, 1930, and the notes secured by the trust deed of wrust 33, 1930, and the trust deed of secured by the trust deed of February 23, 1936, were cancalled; that the trust deed of February 23, 1936, has never been released and discharged of record.

plaintiffs ask the court to determine all questions of procity of liens created by the so eral trust deeds mertioned; that the court will determine and declare by proper decree, the rights of all helders and owners of notes, the payment of which is secured by said trust deeds, or either thereof; that the court will deter ins and by proper decree, declare the egal effect of the several trust deeds mentioned and the rights of the holders and owners of all of the above described promissory notes in said real estate and each tract thereof, as security for the payment of said notes, holding the liens created by said trust deeds superior to all other liens, except taxes, general and special".

The answer of James Shields, one of the holders of notes dated August 33, 1930, is substantially the same as the amended complaint, which alleges in brief, that the purpose of the trust deed dated August 33, 1930, and the notes therein described, was to extend the time of payment of notes of like amount and that there was no intention on the part of the holders of said mortg renotes, described in either of said trust deeds, or on the part of the grantee in said trust deeds described, to release the first lien on tract 3 and

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C nor the second lien on tract a created by the trust deed of August 23, 1926; and that the said persons had no intention to subordinate said lien of the trust deed of august 23, 1926, to the trust deed of July 7, 1928, but on the contrary, it was the intention of said persons to continue the lien of the trust deed dated February 23, 1926.

The enswer of the defendants, deorge Schoottos, Thomas H. Madigan, Margaret Duggan and Margaret McMarland, calls for strict proof of the allegations of the amended complaint that the notes secured by the trust deed dated luguet 23, 1930, were exchanged for the notes lated February 23, 1928, and that the notes evidenced the same indebtedness. It alleges that the notes secured by trust deed dated February 23, 1926, were paid, and that said trust deed about be released of record. The substance of the answer gay be summarized as follows: defendants ever and charge the truth to be that the trust deed dated July 7, 1928, is a first mortgage lien on tracts 1, P and C and deny that trust deed dated Au ust 23, 1930, securing notes for 10,000.00, is a first lien on tracts B and C; charges the truth to be that the indebtedness created and secured by trust doed dated august 23, 1930, is subject, junior and inferior to the lien created by the trust deed of July 7, 1928.

Patrick s. Fitzmerald filed an answer, neither admitting nor denying the allegations of the amended complaint, requiring strict proof thereof. All defendants, excepting Seorge schoottes, Thomas H. Radigan, Margaret Duggan, Margaret McFarland, James Bhiolds and J. Bert Blackburn, successor in trust to George J. Clare, were defaulted.

The hearing on the amended complaint and the answers thereto, was before the chancellor. We decide that under the terms of the trust deed dated August 23, 1930, reciting, "Troperty thirdly described" (tract A) "being subject to a trust deed for \$13,000.00 dated July 7, 1928, and recorded in Book 705, page 97;" that the trust

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5, 1926; n. náší 11er o deed of July 7, 1928, became a first lien on tract 1 to the full amount of \$13,000.00. The notes secured by the trust deed of 1930 were accepted by the holders with the above quoted recital thereia. So further hold that there is nothing in the trust deeds involved in this case, showing or indicating that the lien created by the trust deed deted february 23, 1936, was released or vaived, otherwise than as recited in the trust deed of agust 23, 1930, as above quoted.

was known to George J. Clare and Vess that the trust deed of July 7, 1988, was on record as appears from the recital quoted from the trust deed of aurust 33, 1950. Milliam F. Lowrey, Jr., office manager for w. H. Sjare and Company, believed that the firm sold only notes secured by first trust deeds of mortgages. He never examined the title to real estate mortgages of the firm. We are setisfied that he firmly believed when he verified the original complaint to foreclose the trust deed of July 7, 1988, that it was a lien on tracts , B and C as set forth in that complaint which was prepared by his son, attorney illiam F. Lowrey, Jr. William F. Lowrey, Gr., was a witness on the hearing and there is nothing in his testimony indicating that he was not a fair and credible witness. Failure to produce the books and records of M.V. Glare and Company was not the fault of Mr. Lowrey, Gr.

James Shields, one of the holders of the notes secured by the trust deed of 1930, died before the hearing. 1. 1. Lennon and May Hurley, also owners of such notes of 1930, were defaulted, and did not appear as witnesses. 1. W. Fitzgerald, holder of one note, secured for \$500.00 by the trust deed of 1938 and four notes of \$500.00 each secured by the trust deed of 1930, did not a pear as a witness. George Schoettes, one of the appelless, and owner of three notes for \$1,000.00 each of the 1938 series and one note for 11,000.00 of the 1930 series, did not appear as a witness.

William . Lowrey, Br., te bifie on other tally as hereefter set forth relative to the transcetion of the execution of the notes secured by trust doed of lurnat 18, 1930. If boudled the notes dated usuat 80, 1989, timouth Web office of . T. Tiere and Jompany. I have the notes obserthed in the ingut seed of Schmare 23. 1932. They were returned by the holders in everance for renewals. They were excises set for notes on this seem associate. The notes dosoribed in the trust dued delc? Wrust 20, 1960, are the notes which I gave in exchange for the notes Acted Mebruary ... 13 M. I received the cancelled note: all under take of corner 13, 197, in pince of another issue that was ride to take the pirce of those motes, and as for at I can received I omittalled them eyerlf. In other Lamin was for the same principal amount as times and they are the notes described in the trust seed dated August 23, 1900. I have a model cotion of having personally delivered the various moter of the 1930 leads to the various owners thereof. I would not nev it was all done on the same day. I could not say it was done ever a considerable meriod. It was done at intervals, over bow tone I don't know." "s also testial d that to could not tell who the owners of the 1993 series were, nor could be specifically name the owners of the notes of 1990, without referring to the records of .. F. Siere and Company. The records were not called for by any party to the foreclesure suit. The emidence of the witness, Lowrey, is uncontradicted.

In the decree of foreclosure, the court resites that it was not advised upon the hearing, as to the ownership of the lotes secured by the trust deed of February 25, 1930, but that such notes were duly paid and cancelled after their maturity; that said trust deed should be released of record, by the successor is trust of George J. Clare. The court further finds as a fact, that the notes accured by the trust deed, deted August 23, 1930, were not under a great extend the loan secured by the trust deed, haved Tebruary 33, 1936,

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and that the payment of the notes secured by the trust deed of February 23, 1926, was absolute payment and that the lien of said last before mentioned trust deed did, and does not enure to the benefits of the holders and owners of the notes secured by the trust leed of turnst 25, 1930."

Mr. Voss testified that he owed 123,000.00 on the three tracts known as tracts yA, B end C. That the notes secured by the trust deed of February 23, 1926, and the notes secured by the trust deed dated August 23, 1930, evidenced the same indebtedness, is a fact established by the testimony of Lowrey, Ar., and Voss. The amended complaint alleged that these notes evidenced the same indebtedness, and that the notes secured by the trust deed of February 23, 1220, were exchanged for the notes secured by the trust deed of August 23, 1930. The allegations of the complaint were preved.

There is no evidence in the record showing a novetion, that is, that the notes secured by the trust deed of mount 23, 1936, were given and received as full settlement and maynest of the debt secured by the trust deed of February 23, 1936. There is no proof in the record that the owners of the notes occured by the trust deed of August 23, 1930, or any one, advanced or paid money to discherge and pay the notes secured by the trust deed of February 23, 1930. The evidence is that the notes were exchanged as renewals.

There are no paramount equities in favor of the holders of the notes secured by the trust deed of July 7, 1025. There are no circumstances of the transaction of the execution of the notes occured by the trust deed of August 23, 1930, or other extrinsic evidence, indicating an intention of the owners of the notes occured by the trust deed of February 23, 1925, to subordinate the lien created by the intervening trust deed of July 7, 1928. (Roberts v. Joan, 100 Ill. 137; Campbell v. Trotter, 100 Ill. 31; Christie v. Hale, 45 Ill. 117; Thaver v. Williams, 87 Ill. 469; 33 A. L. 1. 149; 98 I: I. R. 843; Everts v.

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and to the Fr. Edward กไป หา อาอาลย์ 10 10 15 i se iceas er in to beat d selv vo . L 31.50 Do J = Jon to the second of the second * . 2 5331 J mair orev cecure i i i i ្រ ខ្ញុំកាលក្ខក មស្ទា pay to e the error f convolve C = 1 on the second and lo I . The standard of the the second secon 47, 0 . 1 dead of the manufacture of the season of the restar to be seen as ally a the seen a suit all or Composit v. Process, L. all. th; says of v. Mar, en.

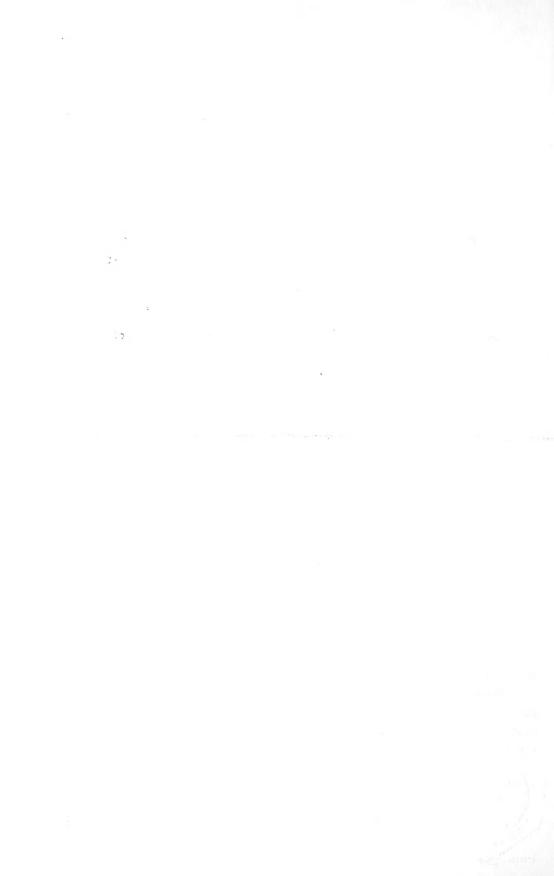
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Lawthory 165 Ill. 487; Baker v. Talzenstein, 314 Fll. 388, Richardson v. Hockenhull, 35 Ill. 134).

There has been a spic of the real outste un or the foreclosure decree. The facts in the case, has a retter of lat, to not sustain the decree firing the priorities of the trust deeds. The case will be required to be direct lours of ill bound to modify include a of foreelessure is conformity to the views a rain expressed. do

STATE OF ILLINOIS, Ss.
SECOND DISTRICT SS. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, thisday of
in the year of our Lord one thousand nine
hundred and thirty

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On APR 2.9 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

v *

Agenda No. 3

IN THE APPELLATE COURT OF ILLINOIS SECOND DISTRI

OCTOBER TERM, A.D. 1938.

Warren Horgan and Mag Horgan,

Appellees

City Trust & Savings Bank of Kankakee, a Corponation, grustee,

Defendant.

Charles V. Maloney,

Appellant.

Appeal from Circuit Court, Kankakee County

HUFFMAN - J.

Mr. Charles Horgan was a resident of the city of Kankakee, during the time in question in this suit. He had cancer of the throat, from which disease he died on May 29, 1957, at the age of seventy-two. Appellee, Warren Horgan, was his stepson and had lived with him for many years. Charles V. Maloney, appellant, was his nephew. Mr. Charles Horgan had been a practicing attorney in the city of Chicago, until his affliction forced his retirement, whereupon he removed to the city of Kankakee. This was about a year prior to his death. On March 4, 1937, he executed a trust agreement with the defendant City Trust and Savings Bank of Kankakee, whereby the sum of \$20,000 was deposited with said trust company as a trust fund, from which the sum of \$20 per week was to be paid to appellee Warren Horgan, after the death of Mr. Charles Horgan. The trust was designated as a spendthrift trust and based upon the incapacity of the said Warren Horgan to protect his property rights, because of his habitual and excessive use of intoxicating liquor. The residue of the trust was to become the absolute property of

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the defendant Charles V. Maloney of New York City. Mr. Horgan reserved the right to revoke the trust. On April 15, 1937, Mr. Horgan amended the trust by providing that if appellee Warren Horgan should marry and desire to purchase a farm, that the trust company should, if the wife of the said Warren Horgan consented, allow him to withdraw from the trust fund a sum of money not to exceed \$10,000, for the purchase of any such farm, the title thereto to be taken in the names of Warren Horgan and his wife, in joint tenancy. On May 10, 1937, Warren Horgan married, and his wife went to live in the residence occupied by Mr. Charles Horgan and his stepson Warren. On the following day, May 11, 1937. Mr. Horgan amended the trust agreement by revoking the amendment of April 15th (with respect to the trustee advancing to Warren, a sum not to exceed \$10,000 for the purchase of a farm), and by said amendment of May 11, excluded Warren from withdrawing any money with which to buy a farm. The trust and all of the foregoing amendments were accepted by the trust company. On May 27, 1937, Warren Horgan first learned from the trust company, that the amendment to the trust of April 15th, permitting him to buy a farm, had been revoked by the amendment of May 11th, whereupon he secured the services of an attorney, who came to the residence that evening, where a will was prepared. which was executed by Mr. Charles Horgan by his mark, and which document directed that the trust company should apply \$10,000 of the money in its hands for the purchase of a farm for Warren Horgan, such farm to be selected by him, and that the balance of the \$20,000 in the hands of the trust company, should be paid to Warren Horgan at the rate of \$20 per week. It was determined the next day by Mr. Warren Horgan and his Attorney that the will was ineffectual as a modification of the trust, whereupon an amendment to the trust was prepared, re-establishing the rights of appellee Warren Horgan to the benefit of the \$10.000 for the purchase of a farm. In other words, the amendment of May 28, 1937, sought to reestablish the amendment of April 15, 1937, which had been revoked by the amendment of May 11, 1937. This last amend-

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ment to the trust on May 28, 1937, was likewise executed by Mr. Horgan by his mark. He died that night. The trust company refused to accept the last amendment of May 28, 1937. Its action in this regard left standing in full force and effect the original trust agreement of March 4, 1937, whereby the spendthrift trust was created for appellee Warren Horgan, and under which he was to receive the sum of \$20 per week. Upon refusal of the trust company to accept the last amendment of May 28, 1937, appellee Warren Horgan and his wife brought this suit in equity, seeking a decree to compel the defendant trust company to accept and abide by the amendment to the trust made on May 28, 1937. The trial court rendered a decree in favor of appellees, thereby upholding the said amendment.

Answers of the trust company and Charles V. Maloney were filed, which set up lack of capacity on the part of Mr. Charles Horgan on the day in question; that the modification of the trust executed on that day was procured by duress and undue influence, by persons standing in a fiduciary relationship toward him; that Mr. Horgan had for a long period of time been kept under the influence of morphine on account of his physical condition, and that the purported modification on May 28th, was void and of no force or effect.

The question presented by this appeal is one of fact. The amendment of May 28th was executed by Mr. Horgan by his mark, and witnessed by W.M. Durham, who was the real estate agent interested in the sale and purchase of the farm in question; and by Emma Dornburg, who was employed in the household of Mr. Horgan during the last two weeks of his illness; and by the attorney who had drawn the attempted will on May 27th and who was present and drew the amendment of May 28th. The Attorney was not acquainted with Mr. Horgan.

It appears that the deceased, prior to his affliction, was actively engaged in the practice of law; that he was a man weighing in the neighborhood of one hundred seventy pounds, and that prior to his death he had become emaciated until he weighed but about seventy-five or

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eighty pounds. The only thing administered to him over the period of his illness w as morphine. As the disease progressed, the amounts of morphine necessary to afford him relief, had to be increased until the average dose was one grain, administered as needed, either by Warren Horgan or his wife. He had not been able to take any nourishment during the last two weeks prior to his death. During this time he was kept under the influence of morphine. It is common experience that cancer is a steadily progressive disease, attended with great pain in the last stages. Also, that the continuous use of morphine over a prolonged period, especially with a person who is beset with pain and disease and who has reached the state of extremis, produces a situation where the individual's powers of mental coordination are impaired and his powers of inhibition are rendered unstable. One kept under the influence of morphine over a long and continuous time, reaches a mental state whereby he may be easily induced or persuaded by those standing in close relationship or by those charged with the administration of the drug.

The evidence in this case has been carefully examined. We do not consider a further discussion thereof would serve any good purpose. In our opinion the decree of the trial court is erroneous and the same is hereby reversed and this cause remanded with directions to dismiss the bill of complaint for want of equity.

Reversed and remanded with directions.

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STATE OF ILLINOIS, second district	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the certify that the foregoing is a tr	State of Illinois, and the keeper of the Records and Seal thereof, do hereby the copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:



Gen. No. 9359 Ag. No. 34

IN THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

OCTOBER TERM, A.D. 1938

Frank Zimmer, Administrator of the Estate of Joseph Zimmer, deceased, Plaintiff and Appellee,

VS.

Chance S. Hill, Defendant

Defendant and appellant

Chance S. Hill,
Plaintiff and Appellant

vs.

John Dallner and Frank Zimmer, Administrator of the Estate of Joseph Zimmer, deceased,

Defendants and Appellees)

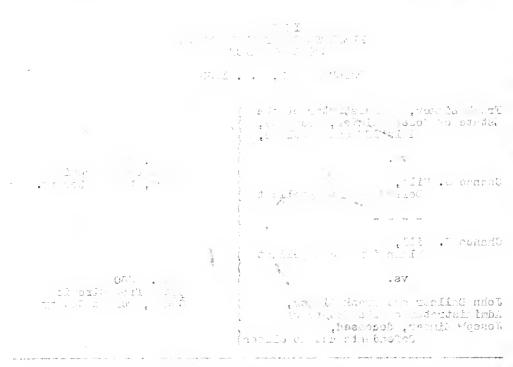
No. 9359 Appeal from Circuit Court, DuPage county.

No. 9360
Appeal from Circuit
Court, DuPage County

Said cause of Hill v. Dallner, et al., No. 9360, has been, by order of this Court, consolidated with Zimmer, Administrator, etc. v. Hill, No. 9359

WOLFE, J.

U.S. Highway No. 34 joins Ogden Avenue at the City of Chicago and the highway is known to persons residing near the highway in the vicinity west of Chicago as Ogden Avenue. Close to the village of Clarendon Hills, Ogden Avenue, a paved road with four lanes for traffic, each about ten feet wide, extends east and west. Entering Ogden Avenue from Clarendon Hills is Coe Road which is about twenty feet wide and paved with tarvia or some similar material. Coe Road is a side road which enters Ogden Avenue on the south, but it does not continue north of it. On September 1, 1936, a few minutes before noon, Chance S. Hill was driving his DeSoto automobile eastward on Ogden Avenue toward Coe Road. At the same time Joseph Zimmer, an employee of John Dallner, was driving the Ford truck of his employer while engaged in delivering ice to the customers



Said sauso of Fill v. Dallaur, et al., He. CLNG, colory, in order of this rank, appareliates with three c_1 and c_2 appareliates with three c_3 and c_4 and c_5 are c_6 and c_6 and c_6 are c_6 and c_6 and c_6 are c_6 are c_6 and c_6 are c_6 and c_6 are c_6 and c_6 are c_6 and c_6 are c_6 are c_6 and c_6 are c_6 and c_6 are c_6 and c_6 are c_6 and c_6 are c_6 and c_6 are c_6 and c_6 are c_6 are c_6 are c_6 and c_6 are c_6 are c_6 and c_6 are c_6 are c_6 are c_6 and c_6 are c_6 and c_6 are c_6 and c_6 are c_6 and c_6 are c_6 are

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of Dallner. At Ogden Avenue near the junction of the two roads, the motor vehicles collided. It is not disputed that Zimmer drove the truck onto Ogden Avenue from Coe Road. As a result of the collision, Hill sustained a broken leg, both vehicles were damaged, Joseph Zimmer was stunned and died about two hours after the accident without regaining consciousness. There was no passenger in either vehicle, excepting Hill and the decedent, Zimmer, and there were no eye witnesses to the accident.

In the Circuit Court of DuPage County, Hill filed a complaint against John Daliner to recover damages for injuries to his person and automobile as a result of the collision, alleging that the collision was caused by the negligence of Dallner's servant, Joseph Zimmer. Later, he filed an amended complaint making Frank Zimmer as administrator of the estate of Joseph Zimmer, deceased, also a party defendant and sought to recover damages from Dallner and the estate of Joseph Zimmer. John Dallner filed a counterclaim to the amended complaint to recover the value of his truck, alleging negligence by Hill. Subsequently, the administrator, in the same court, filed a complaint against Hill to recover damages for the death of Joseph Zimmer, alleging negligence on the part of Hill.

The two suits were tried together and both were to abide the verdicts of the jury and the judgments of the court thereon. After the conclusion of the evidence, Dallner withdrew his counterclaim. The jury found Hill guilty and fixed the damages for the death of Zimmer at \$6,000.00, and judgment was entered on the verdict in the suit of the administrator, against Hill. In the suit of Hill against Dallner and the administrator, a verdict of not guilty was returned and appropriate judgment rendered thereon. Hill has appealed in both suits and the administrator and Dallner appear here as appellees. There has been filed in this court onereport of proceedings at the trial, and the appeals for review have been joined by this court at the request of the parties to the two suits.

At the trial, the court determined that Hill had the right to open and close the case and this procedure was adopted by the parties.

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At the trial, the court determined that ill had the right to open and close the case and tria procedure was adopted by the parties.

It therefore became incumbent on Hill to maintain the cause of action stated in his amended complaint, to prove by a preponderance of the evidence that Joseph Zimmer was guilty of actionable negligence and himself free of contributory negligence. On the question of contributory negligence by Hill, it is argued on his behalf, that Joseph Zimmer was guilty of wilful and wanton misconduct at and before the time of the accident. The question of Zimmer's contributory negligence, on the contention that he was guilty of wilful misconduct, came up on motions made by the administrator and Dallner at the close of Hill's evidence for a directed verdict.

In the first count of Hill's complaint, in paragraph 6 thereof, it is charged in subparagraphs as herein designated, that Zimmer did one or more of the following acts--"carelessly and negligently:

(a) operated said truck so that it collided with the automobile of Hill; (b) operated said truck into said intersection at a high, dangerous and excessive rate of speed; (c) proceeded without keeping a reasonably careful lookout and (d) failed to stop and give the right of way to the automobile of Hill; (e) proceeded while the view of the intersection was obstructed by elevated grounds and embankments, and without giving any warning or any reasonable notice of his intention to enter said intersection; (f) without having said truck equipped with brakes adequate to stop the same."

By the second count, the several acts of commission and omission charged in the first count, are alleged to have been wilfully and wantonly committed.

Extending in both directions at Coe Road, Ogden Avenue is a straight highway for some distance. A viaduct conveying State High-way No. 54 over Ogden Avenue, is about two blocks east of Coe Road. From a point west of Coe Road, Ogden Avenue slopes eastward toward the viaduct. It is conceded by the parties that the driver of an automobile stopping near, or at the outlet of Coe Road into Ogden Avenue, could see a car approaching Coe Road on Ogden Avenue from

It therefore became income bent of this to the form the action states in the process of the evidence what decept the rest of the evidence and himself from or entertial the form of the evidence and himself from or entertial the form of the first of the form of centrification and the form of the

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Axtending in both directions at Joe Rows, (gate lyenus is a straight highwar for some distance. A viaduot convertor Store High-way No. 54 over ugden Avenue, is about two blooks cant of Goe Road. From a point wost of Goe Road, Ogden Avenue clopes eastward toward the viaduot. It is conceded by the parties that the driver of an automobile stopping near, or at the outlet of Goe and into Ogden Avenue, could see a car approaching Ooe Road on Ogden Avenue, could see a car approaching Ooe Road on Ogden Avenue, could see a car approaching Ooe Road on Ogden Avenue from

the west for a distance of 516 feet to the crest of a hill there in Ogden Avenue. It is stipulated by the parties that there was a stop sign approximately fifteen feet south of the concrete on Ogden Avenue and about six feet east of the improved part of Coe Road; that there was a slow sign immediately south of the concrete on Ogden Avenue about 300 feet west of Coe Road, and another one west of that a distance of about 800 feet from Coe Road. At the time of the collision, Emery Strauley and Harold Ankley, two employees of the Western Gas & Electric Co., were riding in a truck of their employer, driven southward on Highway No. 54 by Ankley toward the viaduct, and they were about a half block north of Ogden Avenue at the time of the impact of the two motor vehicles.

Strauley testified that Hill's car, after the collision, was about thirty feet in a field north of Ogden Avenue and it was facing north. He further testified substantially as follows: "I saw a cloud of smoke rising from Coe Road and Ogden Avenue which looked like it came from about the center of Ogden Avenue. I next saw a car coming out of this smoke going north. I saw the truck after the smoke cleared up. The accident was over after I saw the smoke and the car go into the ditch, through the fence north of Ogden Avenue. I drove to the place of the accident. The body of the truck was separated from the chassis. The body of the truck was a little west of Coe Road and in the second lane from the south in Ogden Avenue. The chassis was facing northeasterly, the back end nearly opposite the center of Coe Road; I would say that more of the chassis was north of the center line than south of it, part in the third and part in the second lane from the south in Ogden Avenue. Joseph Zimmer was lying in the center lane from the south in Ogden Avenue. There was an electric light pole there opposite Coe Road. The shoulder on the north side of Ogden Avenue is level with the road for about seven feet and then drops to the prairie or field. Below the shoulder is a fence. car just missed the pole and went through the fence; I saw no scrape marks on the pole. Hill was in his car after the accident and Ankley

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and I took him out of the car and laid him on the ground." Ankley, excepting that he could not say that the 'puff of smoke' came from the middle of Ogden Avenue, testified to the same effect as Strauley. John Hartman, a policeman of the Village of Hinsdale, arrived at the place of the accident a short time after it happened. He testified as to the positions of the body of the truck and the chassis on Ogden Avenue substantially as did Strauley and Ankley.

Dr. Robert Johnson, who drove his car over the crest of the hill west of Coe Road, almost immediately after the collision, testified that the body of the truck, the chassis and Zimmer were in the north part of the center line of Ogden Avenue and, to the best of his recollection, about opposite Coe Road. He further testified that there were tire marks on the south side of Ogden Avenue beginning west of Coe Road and running some fifty or sixty feet diagonally to the northeast and ending in a pile of dust and debris on the north side of Ogden Avenue. A witness testified, that after the accident, part of the chassis was in the third lane from the south and part in the second lane from the south; the body of the truck was lying in the third lane from the south; that the chassis was east and the body of the truck west of the travelled part of Coe Road. There was also testimony to the effect, that a few days after the accident, the brakes of the truck were examined and it was discovered that the brake lining, or band, over the drum of the right rear wheel was worn off so that there would be a metal to metal contact of the brake and the drum of that wheel when the brakes were applied; that if the brakes of an automobile were properly adjusted good "brakeage," could be obtained although the brake linings were badly worn or off. Several witnesses testified that Hill was a careful drive. This concluded the testimony introduced by Hill so far as material to the issue now under consideration.

At this stage of the trial, Dallner and the administrator made their separate motions for a directed verdict as to the second count of Hill's complaint. The motions were sustained. It is argued by and I team him out of be ser and laid of the service services and bank of the services of the

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At this stage of two brist, Dall or call the Portion of a constant the separate motions for a directed veriget as to a constant count of Hill's complaint. The motions were subtained. It is somewhat in

Hill that the court erred in sustaining these motions.

It is not disputed by the parties that Zimmer drove the truck into Ogden Avenue from Coe Road, or that Hill at the same time, drove his car toward Coe Road on Ogden Avenue. The evidence introduced by Hill proved the positions of Zimmer, the body and the chassis of the truck on Ogden Avenue after the accident. The length, course and termination of the tire marks made by Hill's car, after its brakes were applied, were also proven. The reasonable inference may be drawn from these facts, that the motor vehicles violently collided in Ogden Avenue, near the junction of the two roads. These circumstances are not proof of facts from which the inference or conclusion may be reasonably drawn that Zimmer was guilty of wilful misconduct, as charged in Hill's complaint. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be deduced from them, to show that Zimmer was guilty of wilful misconduct. We do not think that it can be fairly said that because of the positions of the motor vehicles and body of Zimmer on Ogden Avenue after the accident, the course of the tire marks, and the further fact that there was a violent collision of the vehicles, are sufficient proof of facts from which the inference can be legitimately drawn that Zimmer before, or at the time of the accident, was guilty of wilful misconduct. Should it be admitted that as a resonable inference to be drawn from the evidence, that Zimmer did not stop the truck before entering Ogden Avenue, and thereby violated the law, it is not a legal conclusion, because he violated the law, that he was guilty of wilful misconduct. Browne v. Siegel, 191 III. 226; P.C. C. & St.L. Ry. Co., v. Kinare, 203 Ill. 388; Streeter v. Humrichouse, 357 Ill. 234; Cook v. Big Muddy Mining Co., 249 Ill. 41. There is no proof that Zimmer was guilty of a wilful failure to stop the truck before entering Ogden Avenue. A conscious act or neglect is wilful, although there is no evil intent, but wilfulness implies something more than a mere failure to exercise ordinary care. There

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is a clear distinction between a negligent omission and wilful failure to act, and wilfulness and negligence have always been recognized as the opposites of each other -- Cook v. Big Muddy Mining Co., supra. There must be facts proved from which the legitimate inference may be drawn, that the person charged with wilful misconduct has committed or omitted some act or acts bringing his conduct within the legal definition of wilful misconduct. Cook v. Big Muddy Mining Co., supra; I.C.R.R. Co. v. Leiner, 202 Ill. 624. It is a matter of conjecture, as the evidence stood at the close of Hill's evidence, that Zimmer approached the intersection at a dangerous rate of speed, or so rapidly that he was unable to stop the truck before entering Ogden Avenue. There is no proof that the defective brakes on the truck, (accepting as true the evidence to the effect that they were defective) proximately contributed to the collision (Cook v. Big Muddy Mining Co., supra.) The trial court did not err in directing a verdict for Dallner and the administrator at the close of Hill's evidence, under the second count of Hill's complaint charging wilful misconduct.

Also at the conclusion of Hill's evidence, the defendants, Dallner and the administrator made motions to strike sub-paragraphs (b), (d) and (e) of paragraph six of the first count of Hill's complaint. The motions were allowed. Hill's case was ultimately submitted to the jury on the allegations of negligence, stated in his complaint, that Zimmer carelessly and negligently: (a) operated the truck so that it collided with the automobile of Hill; (c) proceeded without keeping a reasonably careful lookout, and (f) without having said truck equipped with brakes adequate to stop the same. As above stated, at the conclusion of all the evidence, both on behalf of the plaintiff and the defendants, the jury returned a verdict of not guilty on those charges. It is contended that that verdict is against the manifest weight of the evidence. It is also contended that the verdict against Hill in the suit of the administrator, is against the manifest weight of the evidence. A determination of these contentions will be deferred until all the evidence in the case may be considered.

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The first count of the administrator's complaint charges that Hill carelessly and negligently: "(a) operated his automobile so that it ran into the truck of the deceased; (b) and operated it at a high and dangerous rate of speed (c) without keeping a reasonable lookout ahead, (d) failed to decrease the speed of his automobile as he was approaching said intersection, (a) and carelessly and negligently failed to drive said automobile on the right half of said highway, but on the contrary, drove the same on the left half thereof, contrary to and in violation of the provisions of Section 54 of Article VII of the Uniform Act Regulating Traffic on Highways of the State of Illinois, and thereby cause said automobile to run upon and against and come in violent contact and collision with the motor truck of the deceased; (f) and carelessly and negligently failed to pass to the right of the motor truck of the deceased." By the second count of the complaint the acts of omission and commission, charged in the first count, are alleged to have been committed wilfully and wantonly.

Evidence was introduced by Dallner that about a week before the collision, the brakes of the truck were adjusted; that the brake bands were in good condition and the car given a trial run to test the brakes and that they were in good working order.

After the introduction of evidence, to prove that the brake bands of the truck were in the same condition as they were directly after the collision, and at the time of the trial, the brake bands were introduced in evidence. In the suit of Hill against the defendants, Dallner and the Administrator, it cannot be fairly

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of with radiation of the forms would be T that it read into the rund of the dweets, it, if one or at the -workers of Alexander and A. (a) issues to other numerous that it has be to writer . It beens to restant of beauty (M) (incomit added will as a was (r, r) , it is easier in (r) and (r) easier is a (r)and neplicently called to drive rold editionable of the called of said his aways, our contractors of the contractors of the contractors and his said to maif ble soft, content of to end to end to the content of the contains of Section 54 of the trial of the filler of the formation and maken ed fig brains of the server of late off, and figure as the edge. remoderate to be obtained decipied on the many of affidom guranion, in 1833 superación elò implicado de construcción de - burt water are wealthy a man army of habity althorities bus of the despased. The winder of early and the average of the une assaof emisation and securious, on read in the first count, at alleged to have nown demnister his delice on he reserve.

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said that the verdict of the jury is against the manifest weight of the evidence on the question whether the truck was, at the time of the accident, equipped with adequate brakes.

was in the field about thirty feet north of Ogden Avenue, almost opposite Coe Road. That the tire marks, about sixty feet long, starting from the south lane of Ogden Avenue, extended in a north-easterly direction to the third lane on the north side of the avenue and that they ended about thirty-five feet west of Coe Road; that there was oil where the marks end; that the truck chassis was about thirty feet east of Coe Road lying on the shoulder north of Ogden Avenue; the body of the truck was west of Coe Road about forty feet and off the shoulder north of Ogden Avenue.

Evidence was introduced to prove the habits of the decedent, Joseph Zimmer, as a careful driver, to which there was no objection by Hill, excepting as hereinafter stated.

The attorney for the administrator offered to read to the jury a portion of the testimony of Hill, at the inquest over the body of Joseph Zimmer. The offer was objected to by Hill's attorneys as not impeachment or proper. Upon the statement being made by counsel for the administrator, that the offer was not made for the purpose of impeachment, but as admissions of Hill at the time the inquest was held, defendants were permitted to read portions of Hill's testimony given before the coroner. This was done over the renewed objection of counsel for Hill. It is argued by counsel for Hill that this was error by the trial court. We do not concur with this contention. Hill was a party to the suit. He testified voluntarily before the coroner, after being informed that he could claim his legal right not to testify. He stated that he wanted to testify. (Lyons v. The People, 137 Ill. 602; Merchants' Loan & Trust Co. v. Egan 222 Ill. 494; Carroll v. Kraus 295 App. 552.) The portions of Hill's testimony before the coroner and read to the

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jury, appear in the abstract of the record filed in this court.

Evidence was introduced to prove that Hill drove his car at a fast rate of speed in urban sections and that he did not always obey stop signs while driving his car.

At the close of all the evidence, Hill made a motion for a directed verdict on charges of the first count of the administrator's complaint. The motion was overruled. Thereupon, Hill made separate motions for a directed verdict on the charges of the administrator's complaint designed a, b, d, e and f. The motions were overruled excepting on charges d and f and the jury was instructed to find Hill not guilty on the charges d and f. It is assigned as error by Hill that the court erred in overruling his motion for a directed verdict on the charge e of the administrator's complaint. Upon the request of Hill there was given an instruction to the jury to find Hill not guilty on the second count of the administrator's complaint, which charges wilful and wanton misconduct.

On the question that the verdict finding Dallner and the administrator not guilty of the charges alleged in Hill's complaint is against the manifest weight of the evidence, it is urged that the evidence shows manifestly and conclusively that Joseph Zimmer, the truck driver, was guilty of wilful misconduct and therefore an action by his administrator is barred, although conceding, for the sake of argument, that there is evidence in the record tending to prove actionable negligence by Hill. For the reasons already stated in this opinion, the contention cannot be considered. On the point that the verdict is against the manifest weight of the evidence, it is also argued that there is nothing in the record proving Hill guilty of actionable negligence. Unless it can be said as a matter of law that there is no evidence, including legitimate inferences to be drawn therefrom, proving the negligence of Hill, or proving freedom of contributory negligence by Joseph Zimmer, it is our opinion that it cannot be said that there is a manifest weight of the evidence favoring either party to the two suits.

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The rate of speed at which Hill was driving his car before the collision, was proved. It was also proved that the tire marks of his car extended from the south side of Ogden Avenue in a northeasterly direction for a distance of about sixty to seventy feet and terminated on the north side of Ogden Avenue. Hill testified (athhe inquest) that as he approached Coe Road he was giving his attention to the overpass and slowing the speed of his car for the curve beyond the overpass. It is stipulated by the parties that the view of Ogden Avenue approaching Coe Road from the west was unobstructed for a distance of 513 feet. Whether Hill was negligent in not observing the truck and avoiding a collision, either while the truck was on Ogden Avenue, or at the outlet of Coe Road, we are of the opinion was a question of fact for the jury. (Blumb v. Getz, 366 Ill.273).

There was evidence introduced to prove that Joseph Zimmer was a careful driver. Whether he failed to stop at the junction of Coe Road and Ogden Avenue was a question for the jury. Casey v. Chicago Rys. Co., 269 Ill. 386; Petro v. Hinds, Director General of Railroads, 299 Ill. 236. If he failed to stop, the question of fact remained whether his failure to stop proximately contributed to the accident. Jeneary v. C. & I. Traction Co., 306 Ill. 392. The question of contributory negligence by Joseph Zimmer was a question of fact for the jury.

A witness by the name of George Bigler, called by the administrator to prove the habits of Joseph Zimmer as a careful driver, testified that he lived in Clarendon Hills; that the decedent delivered ice to his home for about two weeks before the accident; that he saw him drive the truck north on Coe toward Ogden Avenue five or six times. Over Hill's objection, he testified as follows: "He would approach Ogden Avenue, make a stop for Ogden Avenue, and then turn left and head west on Ogden." Joseph Zirmer had been delivering ice for Dallner about twelve days before the accident. This evidence of Bigler was incompetent. (Gray v. Chicago R.I.&P. Ry. Co., 143 Ia. 268, 121 N.W. 1097; Dalton v. Chicago etc., R.R.Co.

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114 Ia. 257, 86 N.W. 272; L. & N.R.R. Co., v. Taylor's Adm'r., 51 Ky. L. Rep. 1142, 104 S.W. 776; Wigmore on Evidence, Vol. 1, page 166 Sect. 99) It was argued to the jury by the attorneys for the defendants, Dallner and the administrator, that the inference could be drawn from the evidence of Bigler that Joseph Zimmer stopped the truck before entering Ogden Avenue from Coe Road before the accident. It is also the theory of said defendants that Joseph Zimmer, after entering Ogden Avenue, drove the truck on Ogden Avenue toward the west. The evidence was prejudicial to Hill.

It is also contended that the court erred in overruling Hill's motion for a directed verdict on a harge e of the administrator's complaint. There is no evidence proving, or tending to prove, that Hill negligently drove his car on the north half of Ogden Avenue before the accident.

It is also complained by Hill that the court erred in refusing him the right to testify, it being contended that he was a competent witness against the co-defendant, Dallner, although not a competent witness against the administrator under the Evidence Act. It is our opinion that he was not a competent witness, although Hill requested the Court to limit his testimony, as being against Dallner only. (Sullivan v. Corn Products Co., 245 Ill. 9; Ackman v. Potter, 259 Ill. 578, 582; Merchants' Loan & Trust Co. v. Egan, supra).

As before stated, it was incumbent on the administrator to maintain the charges of negligence contained in his complaint to prove Hill guilty of actionable negligence and his intestate before and at the time of the accident, free of contributory negligence. The question of the proof of both of these essential elements in the case of the administrator rests strongly on the theory that Joseph Zimmer stopped the truck at the outlet of Coe Road into Ogden Avenue and then proceeded to drive west on Ogden Avenue on the north side of Ogden Avenue where he was struck by Hill's car which was before the accident, being negligently and contrary to law driven on the north side of Ogden Avenue. It was the incompetent testimony of the

114 Ia. 257, 83 I.O. 273; 1. C. M.R.R. 30., V. T. I.L.'s R. 1. . . 31

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witness Bigler, which to an extent larger than any other element in the case, supports the above theory. It is also plain that Bigler's testimony was a strong link in the evidence offered by the defendants, Dallner and the administrator to the complaint of Hill, in their defense that Joseph Zimmer was in the exercise of due care for his own personal safety, before and at the time of the accident.

The judgment in the case of Frank Ziumer, a dministrator of the estate of Joseph Zimmer, deceased, against Chance S. Hill is reversed and remanded to the Circuit Court of DuPage County for a new trial. An order of similar import to the above is hereby ordered entered in the case of Chance S. Hill against John Dellner and Frank Zimmer, administrator of the estate of Joseph Zimmer, deceased.

Reversed and Remanded.

witness Sigler, which to an entent larger timent, other of and in the case, supports the chove theory. It is also also the Sigler's testiment was a strong high intended in a subject of the defendants, Dallrer at the chickership in the in their defendant that descent in the in their defendant that descent incomes the descent of the descent of the case of the care for the start and descent in a caller.

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STATE OF ILLINOIS, SS.	
second district	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of th	e State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a	true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty

Clerk of the Appellate Court



Ag. No. 4.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A.D. 1939.

Virginia Warren,

(Plaintiff) Appellee

VS.

City of Waukegan, a municipal corporation.

(Defendant Appellant

Appeal from Circuit Court, Lake County.

WCLFE, J.

The plaintiff, Virginia Warren, started suit in the Circuit Court of Lake County against the City of Weukegan, for damages she alleges she sustained, when she alighted from an automobile and tripped and fell over a curb-box located between the curb and side-walk in what is called a parkway in front of her hope. The box protruded above the ground level about eight inches, and was four inches in width. The complaint is in the usual form and its sufficiency is not challenged in this appeal. The defendant filed its answer and denied any negligence on the part of the City in maintaining the curb-box in question, and denied all the material allegations of the complaint. The case was tried before a jury, which found the issues in favor of the plaintiff and assessed her damages at \$1,000.00, for which judgment was entered.

The record discloses that the plaintiff had been riding with her husband and he stopped and parked his car in front of their home; it was dark; that as she got out of the car, she stepped into the parkway between the curb line and the sidewalk in front of her home and tripped and fell over the curb-box in question; that she was injured and suffered severe pain, and had a miscarriage of a six and one-half or seven months old child. The plaintiff and the doctor testified in detail, to the injuries in question, The appellant does not contend, in this appeal, that the verdict is contrary

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to the weight of the evidence, so a further discussion of the facts is unnecessary.

The first assignment of error is as follows: "The court erred in admitting evidence over objection of defendant which was highly prejudicial, on the promise of attorney for the plaintiff to connect the same, and further magnifying that error by its own motion to exclude the same after plaintiff's attorney had argued same to the jury." The appellee contends that the amount of the verdict, as shown by the evidence, is wholly inadequate. The appellant in its printed brief, states it is not contended by the defendant that the verdict is excessive, but rather that the verdict is not large enough, (being \$1,000.00) thus indicating prejudice and passon of the jury. The evidence objected to by the defendant, was the second miscarriage of the plaintiff after the accident. Upon the statement of the attorney for the plaintiff, that he would connect up this evidence with the injury sustained in the accident, the court overruled the objection to the evidence. attorney for the plaintiff failed to connect up the evidence as avowed. The court of its own motion, after the opening arguments had been made to the jury by plaintiff's attorney, struck out the evidence, and the jury was instructed to disregard it. It is not contended by either party to this litigation, that the court erred in s triking this evidence. The appellant contends that the testimony was highly prejudicial to them. The only effect that this evidence could have upon the jury, would be as to the size of their verdict, and the appellant insists that the verdict, as shown by the evidence, is insufficient for the injuries which the plaintiff sustained. While it was error to admit this testimony, the court corrected it, and it was not prejudicial to the rights of the defendant. The city argues the fact that it was not to blame, in any manner, for the accident. They failed to present this question to the court, and by their failure to assign error, that the verdict is against the weight of the evidence, they /waived any question as to the City's liability, because of the verdict being contrary to the weight of the evidence.

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The second assignment of error is, "The court erred in refusing to admit evidence as to the number of other curb-boxes similar to this located within the City of Waukegan, as a basis of showing lack of exercise of ordinary care in crossing any parkway in the City without expecting such obstruction." Counsel for appellant cite three cases where proof of other accidents have been allowed to be admitted in evidence, as showing the dangerous conditions that existed at the time, and for the purpose of showing knowledge of that danger. one case, Wibel vs. The Illinois Central Railroad Company 165 Ill. App. Page 349, the Court stated, "The fact that the company was not accustomed to ballast its tracks at the places similar to the one in question, that the plaintiff sustained his injury, if it was a fact, would not excuse the company from ballasting its track at the place this injury occurred, if it was required to do so, in order to make it a reasonable safe track for the use of the employees." The evidence in the present case is uncontradicted, that the claintiff did not know of the existence of the box in question, and whether she knew of any of the other boxes, was immaterial in this case. Our attention has not been called to any case where such evidence has been held to be admissible.

We find no reversible error in the case, and the judgment of the trial court will be affirmed.

Affirmed.

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STATE OF ILLINOIS, second district	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
or said Second District of the	State of Illinois, and the keeper of the Records and Seal thereof, do hereby
ertify that the foregoing is a to	rue copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, this day of
	in the year of our Lord one thousand nine
	hundred and thirty-
	Clerk of the Appellate Court



7472

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

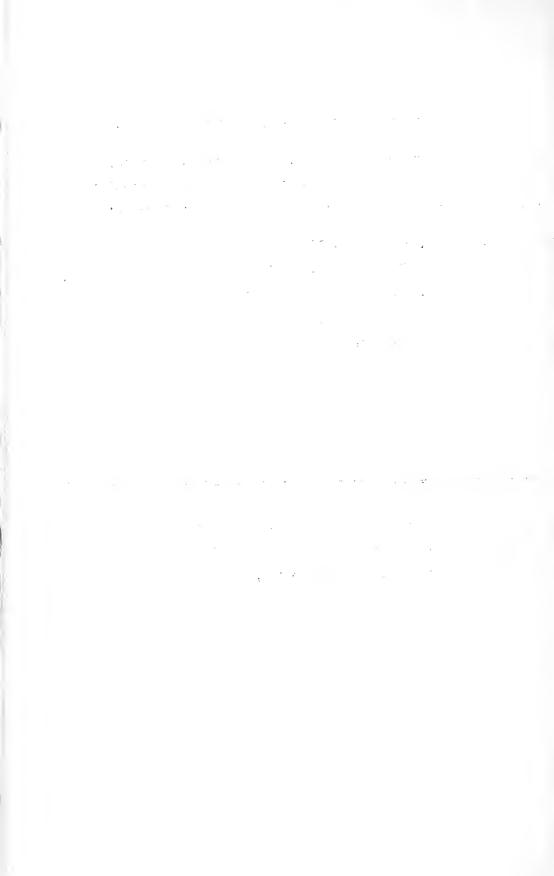
Hon. FRED G. WOLFE, Justice

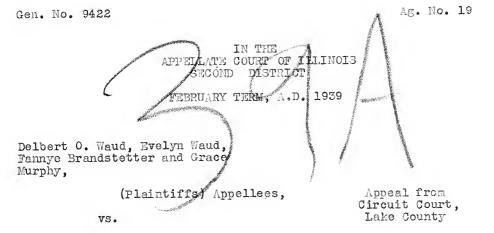
Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:





Maurice Van Landuyt, (Defendant) Appellant.

WOLFE, J.

Delbert O. Waud, Evelyn Waud, Fannye Brandstetter and Grace Murphy filed a complaint at law against Maurice Van Landuyt for damages alleged to have been sustained in a collision on April 16, 1938, between an automobile owned by Delbert O. Waud and operated by Evelyn Waud, and an automobile owned and operated by Maurice Van Landuyt. The complaint alleged that Fannye Brandstetter and Grace Murphy were passengers in a car owned by Delbert O. Waud, which was being driven by Evelyn Waud, north on Fulton Street near the intersection with Lloyd Avenue in Waukegan, Lake County, Illinois; that Maurice Van Landuyt drove his automobile west on Lloyd Avenue negligently and wilfully and without keeping a proper lookout for other people on said highway, and at an excessive rate of speed, and without proper brakes; that as a result of the negligence, or wilful and wanton misconduct of Van Landuyt, a collision occurred and Evelyn Waud, Fannye Brandstetter and Grace Murphy each sustained injuries and the automobile of Delbert O. Waud was damaged.

Maurice Van Landuyt filed his answer and denied all acts of negligence and wilful and wanton misconduct. He denied that the plaintiffs were in the exercise of due care and caution for their

Delbert U. 1894, Fright 1894, "Sanaye Prindstotter [18 Frace Ruro] V.

(Flaintiffs) appollers,

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Haurice Van Dandurt, (Defencist, Greinant.

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Delicer (. Nash. is the term of the remadable of a not trube of any column I tenther, which the the Lamon in bell's right damages alleged to kere been rustanced in a colifician to the second of 1938, between an automobile owice by Delbart C. ward operated by Livelyn Ward, and swe nuturnowike or out it to omnamize the country Van Bandugt. The complaint aller with Faurin in whiteer and ment trends was being drive, by Evel, m.jout. Booth or Fulter stored near the intersection with bloyd avance in authorar, Fare County, Illinois; that Laurice Var Luniage drove his intronlie west on flowd Avenue menligently and wilfully and without resping a proper lookout for other people on these of the standard as a speed, and without proper badden; that as a mosult of the periodece, or wilful and we atom allocated the last tast, a collision corn med and Ivelim haud, Amure transatistic. In Tree triply each prating injuries and the cute while of Delbart O. and res dome od.

laurine Ver La. Suft filed is enswer on dested all ests of negligence and willful and wester hisosophus. To dested that the plaintiffs were in the suspense of due care and cention for their

own safety, and denied any and all damage claimed by them. He affirmatively alleged that Evelyn Waud was guilty of wilful and wanton misconduct which caused the collision. Later, the charge of wilful and wanton misconduct of the complaint answers were dismissed. The case was tried before a jury who found the issues in favor of the plaintiffs and assessed their damages as follows: Evelyn Waud \$200.00; Delbert 0. Waud \$247.50; Fannye Brandstetter \$640.00 and Grace Murphy \$4,500.00. Judgment was entered upon these various verdicts and it is from these judgments that this appeal is prosecuted.

At the close of plaintiffs' evidence and also at the close of all the evidence, the defendant entered a motion for a directed verdict. He claimed there was no evidence to sustain the plaintiffs' case and that the defendant was not guilty of any negligence which proximately contributed to the accident in question. The overruling of this motion is the chief contention of the appellant in this case. The record shows that Grace Murphy, one of the original plaintiffs, now appellee, testified that she was riding in the Waud car at the time of the accident, and sitting on the front seat with Mrs. Waud, the driver; that they were travelling north on Fulton Avenue approaching Lloyd Avenue; that as they approached the intersection, they were driving 20 to 25 miles per hour; that on account of some children playing in the street, Mrs. Waud reduced the speed of the car to not more than 20 miles per hour; that as they were approximately 100 feet south of Lloyd Avenue. she looked east across Washington Park and could see a distance of 350 to \$ 400 feet, and there was no car approaching on Lloyd Avenue at that time; that the car proceeded in a northerly direction and she glanced to her left, or west and saw no car coming; that as the Waud car was past the middle of the intersection, she heard the roar of a speeding motor and turned to the right and saw the defendant's car approaching; that the car was coming very fast; that when she first saw the car, it had not yet entered the intersection, and the Waud car was three-quarters across the intersection. Evelyn Waud's testimony is practically the same as Grace Murphy's. The testimony of

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these two witnesses standing alone, would certainly be sufficient to sustain a verdict in favor of the plaintiff and the court did not err in overruling the defendant's motion for a directed verdict.

Maurice Van Landuyt, the appellant, testified in his own behalf that his car was in good condition; that he was driving west on Lloyd Avenue; that he entered Lloyd Avenue at Glenn Rock, which is about one and one-half blocks east of Fulton Street; that he drove west on the north side of Washington park and approached the intersection of both Avenues at the rate of speed of about twenty-five miles per hour; that he saw the car of the appellees approaching Lloyd Avenue; that he first saw it when he was about 250 feet from the intersection; that he again saw it when he was about 25 feet from the intersection, and in his judgment, the appellees' car was 50 feet from the intersection when he was but 25 feet fromit; that he proceeded westward and the other car speeded up across the intersection and the collision occurred. The testimony of the appellant and of Evelyn Waud and Grace Murphy were in conflict and raised a clear issue of fact for the jury to decide. The jury found in favor of the appellees and from a reading of the record, we are satisfied that their finding is correct.

The appellant has assigned error that the court refused to give five of his instructions. The first is, "If you believe from the evidence that the plaintiff by using her faculties with ordinary and reasonable care in looking out for d anger could have avoided suffering the injury of which she complains and that she negligently failed to do so, and thereby proximately contributed to the injury, then the plaintiff cannot recover from the defendant upon the theory of negligence." This instruction was offered separately as for each of the plaintiffs except Delbert 0. Waud. This instruction evidently was tendered for the purpose of showing that each of the plaintiffs were required to be upon the lookout for d anger and exercise due care and caution for their own safety. We think that appellant's given instruction 24 and 42 fully covered the points set forth in the refused instruction and the appellant was not

those two withouses orangle long, and similar of a state to sustain a verdict in favor of the platfff on the normalism the defendant's cotic for a limited orangement.

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prejudiced by the court refusing to give the tendered instruction.

The other refused instruction is: "There was in full force and effect in the State of Illinois at the time of the accident in question the following Statute: 'Motor vehicles travelling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left.' While it is true that this statute does not confer an absolute right of way upon the motor vehicle approaching from the right, the motor vehicle approaching from the left must yield the right of way to the motor vehicle approaching from the right, when it appears that the latter motor vehicle, being driven with due care, will reach the intersection before the motor vehicle approaching from the left can pass over the intersection."

The appellant, in his original brief and argument cites no case to support his contention that this instruction was a proper one to be given by the court to the jury. In his reply brief he cities the case of Riddle vs. Mansager 242 Ill. App. 68, a Second District case. It will be noted in the Riddle case that the instruction started out with, "That if the jury believe from the evidence, etc.," and then quoted the Statute. Then the court in discussing what was necessary to make the instruction applicable, laid down the rule that the driver approaching from the right has the right of way over one approaching from the left, unless the car on the right is sufficiently far away so if being driven with due care, it will not reach the intersection until a car from the left can pass. As an abstract proposition of law, appellant's tendered instruction may be correct, but courts are generally very reluctant to instruct a jury on abstract propositions of law, as they are too apt to get the opinion that the court is instructing them relative to the facts, (People vs. Corbishly 327 Ill. 312.).

In Defendant's given instruction 24 and 33, the law applicab le to the right of way at intersections is set forth, and while the prejudiced By the court refusing to give the terrered in truction.

The object refused instruction is: "leave has 'n fell fore and selfect in the State of illinois at the cime of the deriduati.

Question fue fellowing Statute: ". stor velicles and spin apon public farmers shall give the misstance of the velocities approxeding along interpreting hid for grant and the circumstance is a first of way over those approxeding the general rest the left." While it is true that this statute does not restor he absolute right of her upon the retor venicle approxeding from the right, the motor venicle approxeding from the right, the motor venicle approxeding from the right of way to the retor vehicle approxedion the factor will reserve to the intersection before the motor vehicle care, will reserve an intersection the intersection."

The appellant, is is indicated that of an area of the constant. to suppore a serior first this instruction and a record of the total o be given by the court to a gary. In its replantation altes the osso of Mirrle vr. Farreger Mass Ill. app. CB, a that P District orse. the bedrate weight two weed tand sens clabif as and becomed film tI with, "That if the jors hadieve from the evidence, about and then quoted the Thetate. When the court in discussions of test hosegoury to make the instruction on miscale. Infi ignour of coule and the driver palacentral and transfer in the first of the contract of the c from blee lears, unless the car of the might is sufficiently for pway so if bedist wriven with the eart. It will not at a contentation until a cor imon that helt sum east. es m shahard proportion law, appollant's tendered instruction for be correct, but courts are smoldinggram), har to re your o terminant of incidentary now illeviates of law, as they are too art to ret are uninion that he court is instructing them relative to the free, (People vi. Joekiship INV III. 312.).

In Defindent's given instruction PA and UT, the low appliers le to the right of way et intersections is set forth, add while the Statute is not quoted, the law applicable thereto is stated, and even if the tendered instruction had been in proper form, the jury were instructed relative to the rights of the parties at the intersection and the plaintiff was not been prejudiced by the Court's refusal to give this instruction.

We find no reversible error in the case and the judgment of the trial court is hereby affirmed.

Affirmed.

Statute is not quoted, the law applicable thereto is at test, and even if the testered instruction had been in prosential, the jury were instructed relative to the rundes of the parties of the interestion and the plaintiff has not the rejudies by the Court's refusal to give this instruction.

We find no reversible error in the case and the judgment of the print ocurt is beredy affirmed.

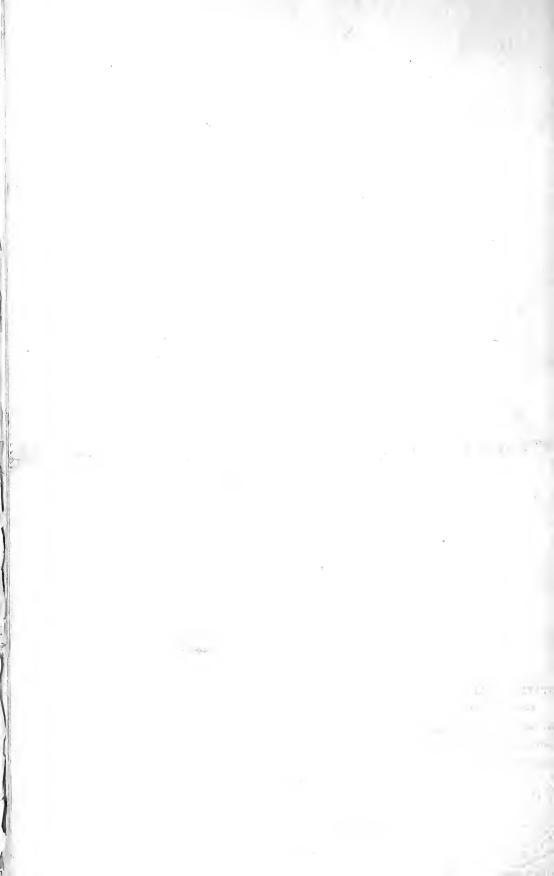
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STATE OF ILLINOIS, second district STATE OF ILLINOIS, Second district State S	
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby	
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,	
of record in my office.	
In Testimony Whereof, I hereunto set my hand and affix the seal of said	

hundred and thirty-___

Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

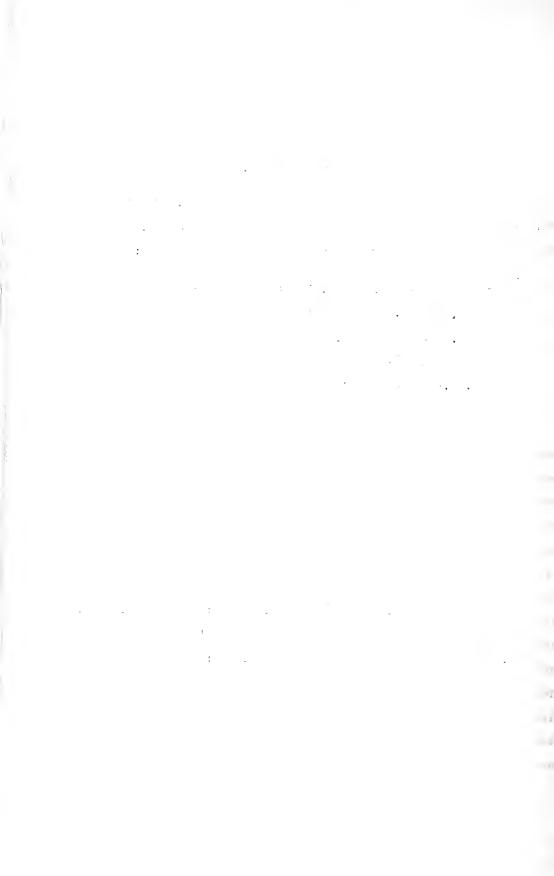
Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice 300 I.A. 614

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On May 12, 1939, the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:



Agenda No. 16

Gen. No. 9416

In the Appellate Court of Illinois

Second District

February Term, A.D. 1939

Tampico Farmers Elevator

Company, a corporation,

Plaintiff Appellant

vs.

Walnut Grain Company, a corporation,

Caroline Keeler and Nellie Breed,

Defendants-Appellees.

Appeal from the Circuit Court of Whiteside County,

Illinois

WOLFE, J.

This is a suit commenced on October 3, 1934, by the Tampico Farmers Elevator Company against the Walnut Grain Company, Caroline Keeler and Nellie Breed, to recover from them the value of corn, which the plaintiff claims belonged to it and which it charges the defendants converted to their own use. The complaint alleges that the plaintiff, a gudgment creditor of one Nels P. Rasmussen, levied upon his interest in the corn, and pursuant to such levy the sheriff sold the corn to the plaintiff at sheriff's sale under execution; that subsequently the defendants Keeler and Breed sold the corn to be delivered to the defendant the Walnut Grain Company, without the knowledge and consent of the plaintiff; that none of the defendants have paid the plaintiff the value of the corn; that the defendants have converted the corn to their own use and by reason thereof, they are indebted to the plaintiff for 1,397 bushels of corn valued at \$1,033.78, with interest thereon, from the date of the conversion. The defendants answered the complaint denying the title of the plaintiff and the conversion and alleging illegality of the levy and the sale under the execution. The gist of the denial of the title of the plaintiff is that the corn, at the time of the

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In the Appela se Court of Illianis

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Plaintiff - ppolitical

Walnut Grain Company. a corsocution,

Caroline Meeler and 'ellic arread,

Defenonda-Typellens.

WOLFE, J.

This is suit comment. In October 1, is , by the Tampico Fermer Vievator Compeny agrimen the inlint. win incheny, Ograline Keeler and Wellie Green, to recomman from that tall wilde of corn, which the plaintiff of his relooped to it will thought the charges the defendants converted to their own use. The complaint alleged that the plaintiff, a judgeout creditor of the Jean Passon, levied upon his interest in the corn, who outstant to such 1 wy the sheriff sold the corn to the plaidtiff of sacriff's hald under execution: that subserventry tan defeadants realer and over sold the corn to be delivered to tall efondent the relationation, vityout the knowledge and congent of the plintiff; that none of the defendants have juid the plaintiff the rolue of the rolm; trit the defendants have converted the corn to their own use one by resea thereof, they are indebted to the plainting for 1,397 bushes of corn valued at (1,033.78, with interest thereon, from the date of the conversion. The defendants and ored the complaint despits the title of the plantiff and the conversion and alloring illerality

of the levy and the sale under the execution. The give of the family of the title of the plaintiff is that the corn, at the time of the

levy, was the property of Leonard G. Rasmussen, the son of the judgment debtor Nels P. Rasmussen; that Leonard G. Rasmussen, after the levy and sale, transferred the title to the corn to the defendants Keeler and Breed by a bill of sale. The corn was purchased from them by the defendant, Walnut Grain Company.

Leonard G. Rasmussen is not the defendant in execution, nor does he claim title to the corn through his father, the defendant in execution. As purchases at the execution sale, the plaintiff took only such title and interest in the corn, if any, which was held or owned by Nels P. Rasmussen at the time of the levy and sale. The corn was in the actual possession of Leonard G. Rasmussen when the levy was made. The burden was on the plaintiff to prove that the corn belonged to Nels P. Rasmussen at the time of the levy.

For about twenty years before 1931, Nels P. Rasmussen had been farming three farms in Tampico Township in Whiteside County. The farms are known as the McBride farm, the Griffith farm and the Ross farm. Nels P. Rasmussen lived on the Ross farm during that time and abso when the levy was made. There are no buildings on the McBride farm with the exception of a double corn crib. Nels P. Rasmussen became financially involved and various judgments were entered against him. On February 2, 1931, a written lease was executed between James McBride, the then owner of the McBride farm, and Leonard G. Rasmussen for the McBride farm for the period from March 1, 1931, to March 1, 1932. Written leases were also executed by the owners of the Griffith farm and the Ross farm with Leonard G. Rasmussen for those farms for the term of March 1, 1931, to March 1, 1932. Leonard G. Rasmussen was the lessee named in all of those leases. On February 2, 1931, an agreement was entered into between Nels P. Rasmussen and Leonard G. Rasmussen reciting that Leonard G.

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Rasmussen had entered into leases demising to him the three farms from March 1, 1931, to March 1, 1932. The agreement provided that in consideration of services rendered and to be rendered by Nels P. Rasmussen for Leonard G. Rasmussen that Leonard G. Rasmussen would assign and transfer to Nels P. Rasmussen all his interest in the crops grown on the three farms and the proceeds from the sale thereof. Leonard G. Rasmussen agreed to perform the usual labor of a farm hand on the farms under the direction of Nels P. Rasmussen and to receive out of the proceeds from the farms forty dollars per month.

A lease was executed between James McBride and Leonard G. Rasmussen for the McBride farm for the year March 1, 1932, to March 1, 1933. James McBride died on August 26, 1932, and the defendants Caroline Keeler and Nellie Breed became the owners of the McBride farm, On September 12, 1932, a lease was executed between the new owners and Leonard G. Rasmussen for the McBride farm for the term March 1, 1933 to March 1, 1934. The lease provided as rental two-fifths of all crops grown on the farm during the term of the The corn was to be put in and division of the crop made at elevator. On the back of the lease is an undated memorandum which extended the lease from March 1, 1934 to March 1, 1935, providing, however, that when the corn was harvested it should be divided as husked, or divided in the crib. The levy was made on the corn on December 21, 1933, and the corn was sold under execution on March 12, 1934. It is the ownership of the corn which was grown and cribbed on the McBride farm in the year 1933, which is in question in this case.

Nels P. Rasmussen testified that he operated the McBride farm, the Criffith farm and the Ross farm for the demised terms thereof, from March 1, 1931, to March 1, 1933, under the terms of the contract entered into by him and his son Leonard G. Rasmussen

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McBride farm, the writtith form we the Form fare for the desired terms thereof, from Noroh 1, 1931, to Merch 1, 1937, under the contract entered into by him and his non-nearly theseses and the contract entered into by him and his non-nearly the secretary.

on February 12, 1931. There is no evidence in the record proving what services were rendered and to be rendered by Nels P. Rasmussen for Leonard G. Rasmussen as the supporting consideration of the contract dated February 21, 1931. The evidence shows that Nels P. Rasmussen farmed the McBride farm from March 1, 1931, to March 1, 1932, and sold the crops raised thereon. It is clear from the evidence that the leases for the farms executed before September 12, 1932, and the contract of February 2, 1931, were a devise or scheme to deceive the creditors of Nels P. Rasmussen. There can be no doubt from the evidence from the date of the first written leases for the farms made to Leonard G. Rasmussen, until the execution of the lease dated September 12, 1932, that Leonard G. Rasmussen was a party to the scheme to hinder, delay and defraud the creditors of Nels P. Rasmussen and as the fictitious lessee of the farms, possessor and ostensible owner of the crops raised on the farms, Leonard G. Rasmussen was a trustee of those crops for the use and benefit of Nels' creditors and the crops were subject to levy by the judgment creditors of Nels P. Rasmussen. (Coale v. Moline Plow Co., et al, 134 Ill. 350; Kingman Plow Co., v. Knolton, (Ia.) 119 N. W. 754). The question presented by the record is whether this condition continued after the 12th day of September, 1932. We apprehend that an answer to this question is required before there can be a determination of the status of any defendant as a bona fide purchaser of the corn and the right, if any, of any defendant to question the legality of the levy and sheriff's sale under the execution.

The testimony of Nels P. Rasmussen and Leonard G.
Rasmussen is in direct conflict on the material question of the ownership of the corm raised on the McBride farm for the crop year 1933.
The circumstances surrounding and attending the execution of the lease
between Nellie Breed and Caroline Keeler and Leonard G. Rasmussen on

on February 12, 1981. Lenn to a count it "the out to the early set and the more action to the contract and are two states for Leon of the darmont. I we survey they conside that of she contract catted Sebraary at, 1981. Int evident, above trat Hele Rasmusued Partee the terrible filter from earen 1, 1951, to track , 1932, and sold the chops modess thereon. It is also to the widence that the lassey of the farms executed refore a rather a., 1938, and the contract of elegry 2, Isla, early elevise or gove a to deceive the areditors o such as manuar. The continue to be no south from the evidence from the outsetted with a little to new for the farms made to lead to a. . . ar lifety with and execution of the littler deted september 13, lyke, and diecoture 4. between a die orthogen. the scheme to liniar, but y and draw the wealth of Mais .. Rasmussen and as the fletility a lesser of the farms, persessor and ostensible owner of the erse, which show that the control of the the control of t The second of th retired and the area of the contract of applied the excellent of Nels P. Aso. 19001 (190810) . Olive no de, com 1, 10 ii. 0:1; Kingman Plow Co., v. Lackton, (1992) ii. c. 1991. . destin prosented by the record is a chlose file condition configure after the 12th day of heplemor, 1 that a swey of this question is recurred set of course dailby a " the dailion of the of the of any determine a bon offic purchaser of the atim of the interior if any, of any o tenders or a tion that lessitify of the levy and sheriff's sole uncer the skeution.

the touting of the analysis of the start of traction of the start of traction of the same second of the condition of the condition of the circums and see surface that the start of the circums and see surface that the circums and see surface of the second of the second

September 12, 1932, were first testified to by Nels P. Rasmussen on behalf of the plaintiff. He testified that after the death of James McBride in August, 1932, he received a letter from Nellie Breed stating that he could rent the farm under the same terms that he had rented it from March 1, 1932, to March 1, 1933. That on September 12, 1932, in response to the letter, he went to Princeton to the office of attorney Spaulding, who was the executor of the will of James McBride. It was at that time that the lease was drawn demising the McBride farm to Leonard G . Rasmussen from March 1, 1932 to March 1, 1933, by defendants Caroline Keeler and Nellie Breed. Nels P. Rasmussen further testified that he wanted the lease made out to Leonard G. Rasmussen as the First National Bank was threatening to close in on him; that Spaulding told Keeler and Breed the reason Nels P. Rasmussen wanted the lease made to Leonard G. Rasmussen, and that they said it was all right to do so. That he took a duplicate of the lease and the lessors took the other. Leonard G. Rasmussen, on behalf of the defendants, testified that he did not remember that there was any conversation when the lease was signed, relative to the matter that his father wanted him named as the lessee because of Nels' creditors; that he took a duplicate of the lease and that his father never had possession of it so far as he knew; that he did not know any reason why the farm was leased to him instead of his father. Caroline Keeler testified that Nels P. Rasmussen did not say that he wanted the lease put in Leonard G. Rasmussen's name because Nels P. Rasmussen was afraid of his creditors jumping on him; that she never knew before August 31, 1934, that Nels P. Rasmussen claimed to be the tenant on the McBride farm.

The plaintiff also introduced other evidence from which the conclusion might be drawn, that Nels P. Rasmussen was the owner of the corn in question and that the subterfuge consisting of

September 1., 13:2, ward till 1 1912 a by phobaif of the plaintiff. We subifice as a first in out to the Mouride is area, 10.1, as excesses a lower and easie mend or discribing which earlies in the same same, and there is no one dank anisates reseased it for abreat 1, 1963, to taken 1, 1965. That on esteement al2, 1932, in response to the leader, Konent to threaten to the joffice of stammay landding, was use the sweethor of the will of The limes owners carried and true amis field to amount . Wind somet the caride Para to Leonard dames and from 1375 so Taron 1933, by derivation outsite and wastern outsite of a first transfer of the contract of the con mussen further testifies at a law m. See that Lay ont to in order 4. Rasmussen is the interest of the transfer of the court to see and the second of the on him; that Bosalding told mealer and pand the raid and carsen we ted the legge crace to confirm of detail on, and that hier the to was all right to we so. That he has a lasticate of the shalf of the feforeents, testified the die nother orbor of a turner Iwas any conversavion alon the lease the aligned, it is not no the matter That his father weat-6 his en ad so the Issaec tershor of ele oreditmore; that he took a duplimate of the loade out that his father never shed possession of 4. as for somewest three new new hor how have era boungs of red ver too bin accepana. . . 100 Jodi boilitees released designated . Also sensors aman s'accernas (. brence ni jug casoi. Iwas afraid of his oraditors jumping on him; thus are never same bofore . ugust 31, i o., out fois . has ussen diright to be the . are? obirPoN suit re taenet

The plaintiff also introduced other emission from which the occurring wight op drawn, that Male . Assumesen was the owner of the own in question and that the supterfuse consisting of

the leases being made in Leonard G. Rasmussen's name continued from March 1, 1933 to March 1, 1934. Nels P. Rasmussen also testified for the plaintiff that he farmed the three farms from March 1, 1933, to March 1, 1934, and that he was the actual tenant on the farm; that he did not operate the farms under the contract signed by him and Leonard G. Rasmussen on February 2, 1931, for the crop year of 1933; that Leonard G. Rasmussen was married in January, 1932 and began farming for himself on a place known as the Pat Kelly farm. He further testified that in the year 1933 to 1934, he furnished the seed and the farm machinery which was used to cultivate the McBride farm; that he hired several men, including G. L. Love, to shock the crop of oats raised on the farm and that he sold some of it to Stacy Anderson and that some of it was sold at the sheriff's sale; that he cut corn from about nine acres on the farm and placed the ensilage in the silo which he rented from Henry Colby and fed the ensilage to his cattle; that he hired Dewey Fritz and Will Erickson to pick the corn which was put in the crib on the farm; that he heard that Leonard G. Rasmussen paid the men who gathered the corn; that Leonard G. Rasmussen helped pick the corn; that in the winter of 1933-1934, accompanied by Henney Colby, he went to see the defendants Keeler and Breed with reference to renting the farm again for the term from March 1, 1934 to March 1, 1935; that the defendants then stated that he had operated the farm all right, but that they did not want to rent the farm to him as they did not care to be mixed up in his and Leonard G. Rasmussen's deal.

G. L. Love testified that he helped harvest the oats crop on the McBride farm in 1933; and that Nels P. Rasmussen hired him and paid him for this work, Stacy Anderson testified that he bought some oats from Nels P. Rasmussen on the McBride farm in the summer of 1933, and paid him for the same. Henry Colby testified that some of

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the corn on the McBride farm was cut and the ensilage placed in his silo which Nels P. Rasmussen rented from him and from which he fed the ensilage to Nels P. Rasmussen's cattle; he also corroborated Nels P. Rasmussen's testimony concerning the conversation with Keeler and Breed about renting the farm for the year 1934-1935. Frank Andersonttestified that he helped haul corn from the McBride farm to the Colby silo in the fall of 1933, and that he was employed to do so by Nels P. Rasmussen. Dewey Fritz testified that in the fall of 1933, he helped gather corn on the McBride farm and was employed to do so by Nels P. Rasmussen; that after he finished picking the corn, Leonard G. Rasmussen asked him to take his pay from him for picking the corn in order that he, Leonard G. Rasmussen, could hold the corn on the McBride farm.

Leonard G. Rasmussen testified that after he was married he owned some horses and corn plows: that he used some of his father's machinery; that he farmed both the McBride and Kelly farms from March 1, 1933 to March 1, 1934; that his father never helped him with the work; that he furnished the seed corn planted on the McBride farm in the spring of 1933; that he furnished most of the seed oats that year and his father provided seed for a few acres. That none of the cats were sold to Stacy Anderson, but that they were hauled to the elevator in Anderson's name without his consent; that he mines hired the men to gather the corn, but denies that he offered to pay Dewey Fritz in order that he might hold the corn.

On June 23, 1934, Nels P. Rasmussen filed in the Circuit Court of Whiteside County a complaint against Leonard G. Rasmussen for an injunction to restrain Leonard G. Rasmussen from cutting and removing wheat growing on the McBride farm. The defendants Caroline Keeler and Nellie Breed were also parties defendants to the suit. In the complaint Nels P. Rasmussen alleged and claimed that he was the owner of the wheat growing on the McBride farm

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and the actual tenant. A temporary injunction was issued and a motion was made by Leomard G. Rasmussen to dissolve the injunction.

Attached to the motion is an affidavit by Caroline Keeler, dated

June 27, 1934, in which she deposes, among other things, that when
she visited the McBride farm, she noticed that the work thereon, was
being performed by Leonard G. Rasmussen and that on no occasion has
she ever seen Nels P. Rasmussen working on the farm. The bill of sale
from Leonard G. Rasmussen to Caroline Keeler and Nellie Ereed for the
corn in question is dated August 25, 1934. The bill of sale recites,
"In consideration of the sum of other good and valuable considerations
and one dollars." There is no evidence in the record what good or
valuable consideration was given by Keeler and Breed for the corn transferred by the bill of sale. When the bill of sale was executed the corn
was in charge of a custodian appointed by the sheriff when the levy was
made and who served as such until the day of the sheriff's sale.

It also appears from the record that subsequent to the 12th day of September, 1932, Nels P. Rasmussen conveyed personal property of his to Leonard G. Rasmussen who gave a chattel mortgage on the property to one Agnes Erickson, a creditor of Nels P. Rasmussen. That in a proceeding to determine the rights of creditors of Nels P. Rasmussen in his property, commenced on January 11, 1934, the Circuit Court of Whiteside County held that Leonard G. Rasmussen had no title to the property described in the chattel mortgage and the foreclosure of the mortgage was permanently enjoined by that court.

The manifest weight of the evidence is to the effect that at the time of the levy on the corn Nels P. Rasmussen was the owner thereof, and that Leonard G. Rasmussen was a trustee of the corn for the use and benefit of Nels P. Rasmussen's creditors. Also, that the defendants Caroline Keeler and Nellie Breed were apprized of facts and circumstances which would cause a reasonably prudent person to

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believe that Leonard G. Rasmussen was a party to the scheme to deceive and mislead the creditors of Nels P. Rasmussen, and that no title to the corn passed to them under the bill of sele by Leonard G. Rasmussen, dated August 25, 1934.

As before stated the levy on the corn was made on December 21, 1933. On March 5, 1934, seven days before the sale under the execution, Leonard G. Rasmussen, Caroline Keeler and Nellie Breed signed applications for Farm Warehouse Certificates, which were issued and indorsed by them to the Commodity Credit Corporation as collateral security for their Corn Producers Note for \$1080.00. The application states that the corn is the property of Leonard G. Rasmussen, Caroline Keeler and Nallie Breed as landlord and tenant partnership with lease expiring March 1, 1935. The corn was sealed in the crib on the McBride farm by the Department of Agriculture. The corn was sold at the execution sale to the plaintiff subject to the Government lien and that of the landlord.

After the execution sale on March 12, 1934, the corn remained on the McBride farm until August 31, 1934, apparently in the possession of Leonard G. Rasmussen, who hauled it from the crib to the elevator of the defendant, the Walnet Grain Company. The Walnut Grain had purchased it from Keeler and Breed. The Government loan of \$1,103.00 was paid and later deducting the cost of hauling and other items of expense, the balance of the purchase price of the corn of \$512.48 was paid to Keeler and Breed. There is proof that the Walnut Grain Company had no actual notice of the levy on the corn.

It is contended by the defendant the Walnut Grain Company, that it is a bona fide purchaser of the corn for value. This contention is based on its claim that the levy indorsed on the execution does not contain a certain and definite description of the corn sufficient to inform said defendant that the corn had been levied on. The indorsement of a levy on personal property should designate

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the chattels by mind or description, so that others interested, such as innocent purchasers or other judgment creditors than the judgment creditor in execution on which the levy is indorsed, may be notified of a change or possession by means of the levy. (Davidson v. Waldron, et al, 31 Ill. 120). The indorsement of the execution of the levy in this case is: "On this 21st day of December, 1933, by virtue of the within execution, I have levied upon all right, title and interest of Nels P. Rasmussen and to the following property: one small safe, shot gun, 12 head of cows, etc., "800 bushels of corn, and all his interest in the corno 600 bushels of oats, cement mixer, etc. Said levy being made subject to levy of Agnes Erickson on execution No. 9806. Notice of levy within execution was posted on the farm occupied by Mels P. Rasmussen being the southeast quarter of section 26, township 19 north, range 6 east of 4th P. M., Whiteside County, Illinois, another notice on the corn crib on the northeast quarter of section 36, township and range aforesaid." The northeast quarter of said section 36 is the McBride farm. It is to be noted that the indorsement does not state that the "800 bushels of corn" is located in a crib nor give the location of the corn. In our opinion the indorsement was insufficient to give notice of change of possession. (Davidson v. Waldron, supra.) There was no change of possession of the corn after the sheriff's sale before the corn was purchased by the Walnut Grain Company. It is our conclusion that the Walnut Grain Company was a bona fide purchaser of the corn for value.

The sale was held on the Griffith from where Nels P. Rasmussen lived. It is contended by the defendants 'that the corn was not present at the place of sale.' It is our opinion that the defendants Breed and Keeler are not in a position to raise this point. (Cook v. Timmons, 67 Ill. 203).

At the sheriff's sale the plaintiff bought 1101 bushels of corn, which was on the McBride farm subject to the landlord's lien

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of two-fifths thereof. The trial court rendered a judgment for the defendants.

The judgment of the Circuit Court of Whiteside County is reversed and the case remanded with directions to that court to enter judgment in favor of the plaintiff for the value of the corn, less two-fifths thereof being deducted for landlord's lien, with interest thereon from the first of September, 1934, until the entry date of the judgment, against the defendants now appearing in the suit excepting the defendant, the Walnut Grain Company.

Reversed and remanded with directions.

STATE OF ILLINOIS,	
STATE OF ILLINOIS, SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the	State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a t	rue copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	Fig. 3. (1
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and thirty
	Clerk of the Appellate Court

Published in Abstract Abstract

Charles E. LeHew, Plaintiff Appelled v. Jack Toombs

Defendant-Appellant

Circuit Court of Jacon County.

APRIL TERM, A.-D. 1939.

Gen. No. 9,151

Agenda No. 21

Mr. Justice Haves delivered the opinion of the Court.

Charles E. LeHew, plaintiff-appellee, will hereinafter be called plaintiff, and Jack Toombs, defendantappellant, will hereinafter be called defendant.

This case is an appeal from the Circuit Court of Macon County, Illinois, where judgment was entered upon the verdiet of a jury against the defendant Jack Toombs, in favor of the plaintiff Charles E. LeHew, in the sum of four thousand nine hundred sixteen dollars and sixty-six cents (\$4,916.66), on a complaint of assault and battery. Complaint consisted of one count, which charged an assault and battery on the plaintiff by the defendant. The defendant filed an answer of general denial and a counterclaim alleging an assault by plaintiff on the defendant.

The occurrences out of which the suit arose took place at the garage of the defendant in Decatur, Illinois, on September 1, 1937. Plaintiff testified that he was sent to the garage of defendant by his father to collect a three dollar bill from the defendant. Defendant denied owing it and claimed he knew nothing of the bill. It appears from the record that an argument ensued, plaintiff's description of which is that the defendant said to him, "you called me a liar," and he further stated that if he did it again he would take his (plaintiff's glasses off and knock h- out of him, and then defendant struck him and knocked him down. Another witness for the plaintiff testified that as plaintiff started to get up, defendant hit him the second time. Defendant denies this and insists that plaintiff struck the first blow. Defendant, in his own testimony, admits that he took blaintiff's glasses off and hit him and knocked him down, and admits he hit him the second time after he got up, but claims that plaintiff



struck the first blow, and that he didn't hit him the second time until plaintiff started to follow him. The evidence shows that the defendant was the heavier and stronger of the two; and that defendant had two of his employees present at the time. The evidence further shows there was little provocation for assault and battery, and the conflict is over who struck the first blow. The Jury, by their verdict, evidently believed the plaintiff, and disbelieved the defendant. Plaintiff received severe injuries,—a crushing of the bones of the face and nose—and was taken to the hospital and there confined for two weeks. The attending physician testified that he found the left side of the cheek sunken; the left eve blood-shot and discolored; a swelling of the soft tissues about that area, and a fracture of the cheek bone which bone was pushed down and out of position. An x-ray was taken and the physician operated and brought the bones back into position. He further testified that the bone which was fractured has a hole in it, and when the bones were leveled out, it was discovered there was a hole through the sinus into the mouth. The doctor stated he had examined the man just before the trial and had found the track from the sinus into the mouth had remained open, and that in the interim he had burned off, with silver nitrate, a granulation of tissue or proud-flesh which had come from this opening into the mouth and which had interfered with the use of the upper plate of his teeth. He further testified that the opening was still there, and that it was draining into the mouth, and as a result of the injury, and for quite some time afterward, there was a paralysis of the nerves of the left side of his face. He gave, as his opinion, that unless some further surgery was done in an attempt to close the opening between the sinus and the mouth that it would undoubtedly remain open and continue to drain. He was not certain whether surgery would cure it. Plaintiff testified, at the time of the trial, that he was bothered with this discharge into his mouth; that it made him sick to his stomach; that he had difficulty in keeping his false teeth in place, and that it interfered with his talking.

The first ground for error relied upon by the defendant is that the verdict is against the manifest weight of the evidence. This is clearly untenable. It is fundamental that a verdict of the jury will not be disturbed where the evidence is conflicting and that



produced by either party when considered alone is sufficient to sustain the verdict in his favor. In addition to the general verdict there was a finding in the negative to the following special interrogatory requested by the defendant.

"Question: Do you find from the evidence that the blows complained of were struck by the defendant without malice and under circumstances which would have led a reasonable man to believe that was necessary to his proper self defense?

Answer: No."

The finding of a jury on a question of fact conclusively binds the parties submitting it.

Complaint is made by defendant that the Court refused to permit him to show the intent, but the record discloses the defendant testified that he hit him with the intent of inflicting bodily injury upon him. The law is, "if the cause of action is an alleged battery committed in the performance of an unlawful or wrongful act, the intent of the wrongdoer to injure is immaterial. The intent to commit the unlawful act is sufficient, or in other words, if the defendant did an illegal act which was likely to prove injurious to another, he is answerable for the consequences which directly or naturally result from his conduct even though he did not intend to do the particular injury which followed." 5 C. J. 621, 622.

The next ground for reversal was the conduct of counsel. Defendant, in support of this, cite a large number of pages in the abstract, examination of which doesn't show anything unusual other than that which transpires in a hotly-contested trial.

We find no harmful error in the instructions. The only question that has caused us much concern is the amount of the verdict. It is large, and we have given a good deal of consideration to this, but in view of the circumstances surrounding the unwarranted assault; the seriousness of the results, and the present physical condition of the plaintiff, we do not feel justified in disturbing the verdict of the jury and the judgment of the trial court in overruling the motion for a new trial.

For the reasons herein assigned, the judgment of the Circuit Court is hereby affirmed.

Judgment Affirmed.

(Four pages in original opinion)



Abstract

Emma J. McMahan, Appellant, v. Robert C. Daugherty, Doing Business as Yellow Cab Company, Appellee.

Appeal from Circuit Court, of Vamilion County.

JANUARY TERM, A. D. 1939.

Gen. No. 9,078

Agenda No. 8

PER CURIAM:

This is an appeal from a judgment of the curvil court of Vermilion county, in a personal injury case

finding the defendant not guilty.

Emma J. McMahan, plaintiff appellant, filed her complaint charging Robert C. Daugherty, doing business as Yellow Cab Company, defendant appellee, with having injured her through the negligent operation of his taxicab by his servant, who was driving on West Harrison street, in Danville, Illinois, and who collided with her automobile, and also charging a violation of Section 49 of an act in relation to the regulation of traffic, approved July 9, 1935, Laws of Illinois, 1935, p. 1248, in that the driver of defendant's taxicab was operating it at a speed greater than reasonable and proper under the circumstances, said cab being operated in the business district of the city of Danville.

The evidence discloses that on June 6, 1936, plaintiff was driving north on Walnut street, near the intersection of Harrison and North Walnut streets. Her car was struck on the right-rear wheel by a west bound taxicab of defendant. Harrison street had been designated as a through street and there was a stop sign

at the south side of the street.

The plaintiff contends that she came to a complete stop and after looking both ways, seeing no cars, started across the intersection. Defendant contends that plaintiff failed to stop and alleges that the injuries sustained by her were proximately caused by her own fault in failing to use ordinary care. The court overruled plaintiff's motion for a new trial and entered judgment in bar of the action. Among the points specified as grounds for a new trial and errors relied upon for a reversal of the judgment were the giving of erroneous instructions for defendant and an error in permitting a traffic stop sign, which had not



been admitted in evidence, to be taken into the jury room with other exhibits.

Counsel for plaintiff make the assertion and are substantiated by the evidence, that when George Wright, a witness for defendant, was testifying counsel produced a yellow traffic sign, two feet in size each way with the word stop in black letters about six inches high, and asked the witness and he was permitted to answer over plaintiff's objection whether there was that kind of a sign at the intersection at that time, to which the witness replied in the affirmative. Another witness in answer to a question said there was a stop sign there like the one on the wall. This stop sign on the wall was never marked as an exhibit or offered in evidence, although it was taken to the jury room with the other exhibits. Counsel for appellant insist that it was prejudicial to the rights of plaintiff to have the stop sign on the wall of the court room during the trial of the case. That the existence of a traffic sign at such intersection was admitted by plaintiff, and at no place in the record was that fact denied or questioned.

The production of the traffic sign by counsel for defendant and the examination of witnesses concerning the same and the placing of it on the wall of the court room and permitting it to remain there during the trial was not objected to by counsel for plaintiff so far as we can discover from an examination of the abstract of the record, neither was such conduct of counsel for defendant specified in plaintiff's motion for a new trial as a ground for reversal of the judgment. There is no doubt but that the court, if it had been appealed to, would have ordered the removal of the sign from the wall of the court room and from the presence of the jury, it being perfectly apparent that the only purpose of the exhibition of the same was to influence the jury in their decision of the cause. Conduct such as this should not go unnoticed. Permitting the traffic stop sign to be taken into the jury room and letting it remain there during the deliberations of the jury as to their verdict was not objected to at the time, nor was the attention of the court called to the fact that it had not been admitted in evidence as an exhibit and was being taken with the other exhibits into the jury room. However, we are of opinion that counsel for defendant are about right when they make the assertion, "there would be no error in the jury looking at the stop sign in the jury room when they had been looking at it all



day in the court room." ('ounsel for plaintiff cannot now complain as it was by their want of diligence that such error occurred.

Counsel for appellee calls attention to the fact that appellant failed to set out in full in their brief the instructions complained of, followed by definite and clear reasons supporting the alleged errors, incident thereto, and for that reason none of the alleged criticisms of instructions can be considered and the main part of the brief calls for no reply. While in some of the districts of the Appellate Court it is insisted that instructions complained of should be set out in full in the brief, and although that is a great convenience to the court, the Appellate Court of the Third District has no such rule, and if the instructions appear in full in the abstract of the record the rules are complied with.

Attorneys for appellee, although critical of the conduct of counsel for appellant in what was claimed to be a violation of the Rules of Practice of this court, themselves violated Rule 9 by quoting evidence in detail and in discussion and argument, in their statement of facts in their brief.

It is contended by appellee that no objection was made by plaintiff to the entry of judgment in bar of the action, and that plaintiff having failed to preserve an objection to this important ruling of the trial court, which has always preceded an exception, this case cannot be reviewed on appeal, and the appeal must be dismissed.

We fail to see any merit in this contention. It was never necessary to except to the entry of a judgment in order to assign error thereon, except in cases where a jury was waived and the cause was submitted to the court for trial, and after the amendment of Section 81 of the Practice Act of 1907, no exception to the entry of judgment was necessary in cases tried by the court. Neither is it necessary to object to the entry of a judgment by the court, in order to assign error on the entry thereof, although defects in judgments and decrees must be urged in the lower court, otherwise they are not subject to review.

After verdict and before final judgment appellant filed a motion for a new trial setting forth her points in writing, particularly specifying the grounds of such motion, and upon a denial of her motion for a new trial filed a notice of appeal, praecipe for record and a report of proceedings and the record of the case is in this court, all in proper time and said cause was taken for decision.



Complaint is made of the excessive number of instructions given at the request of defendant, considering the issues in the case. The practice of giving an excessive number of instructions has been repeatedly condemned. In our opinion the number given in the case at bar, at the request of defendant, was out of all proportion to the issues involved, which were simple. Instructions should be as few as possible, as otherwise they are likely to mislead the jury. It is the province of the jury to determine facts and then apply to them the law as set forth in the instructions of the court. Nine of the fifteen instructions given instructed the jury that plaintiff could not recover, if she was guilty of contributory negligence, while one instruction on that subject was all that was necessary. Nine of the instructions given concluded with the phrase, "then she cannot recover in this case" or "then you should find the defendant not guilty." The giving of an unnecessary number of such instructions has been held improper by the courts. Such repetitions of the idea that plaintiff must be free from contributory negligence in order to recover and the repeated conclusion of instructions with the phrase "then she cannot recover in this case" or "then you should find the defendant not guilty" was well calculated to lead the jury to believe that the court was of opinion that plaintiff was guilty of contributory negligence and that the jury should find the defendant not guilty. Nelson v. Chicago City Ry. Co., 163 Ill. App. 98.

A large number of the given instructions are objecttionable because they are argumentative and not in proper form. Instructions should not only be applicable to the facts in evidence, but they should make application of the law they purport to state to the facts. People v. Isbell, 363 Ill, 264, 2 N. E. (2d) 84.

Instruction No. 2, after quoting the statute giving the right of way to vehicles approaching along intersecting higways from the right over those approaching from the left, then proceeds to inform the jury that if they believe from the evidence that the automobile driven by the plaintiff approached the intersection herein mentioned and the taxicab of defendant approached the intersection about the same time or at or about the same time, it was the duty of plaintiff to yield the right of way. It is objected that the instruction is erroneous because it omits the element of due



care on the port of defendant, as he approached the intersection, citing the case of Riddle v. Mansager. 254 Ill. App. 68, where it is held: "The statute does not authorize such assertion of the right of way regardless of circumstances, distance, or speed." In Salmon v. Wilson, 227 Ill. App. 286, the court said: "It does not contemplate that the right of way be invoked when the car from the right is so far from the intersection at the time the car from the left enters it, that with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the line of intersection." The inry were not instructed as to the elements of due care and speed on the part of the driver of the taxicab as he approached the intersection and for that reason the instruction is erroneous.

A person driving a motor vehicle upon a public highway at a speed greater than is reasonable and proper having regard to the traffic and right of way or so as to endanger the life or limb or injure the property of any person will not be permitted to plead in defense of an action for personal injuries that his motor vehicle and the one driven by plaintiff were approaching along intersecting highways, and that he was aproaching from the right and had the right of way over the plaintiff who was approaching from the left, and that therefore he was not guilty.

Instruction No. 4 is a repetition of instruction No. 2 and was erroneous. Instruction No. 5 informed the jury that the driver of the taxicab had a right to assume that persons approaching Harrison street upon intersecting streets would observe the law and stop their automobile before entering upon said street. This instruction contains abstract propositions of law: and fails to refer to the evidence in the case and should not have been given. The evidence discloses that Harrison street, upon which the driver of the taxicab was proceeding in a westerly direction, was designated by an ordinance of the city of Danville as a through street and that all vehicles must come to a complete stop before entering or crossing the same and that by ordinance every driver operating a vehicle on a street in said city within the business section shall not exceed the maximum speed of 15 miles per hour. The evidence further discloses that Harrison street at its intersection with Walnut street was in the business section of said city.



This instruction failed to tell the jury that before the driver of the taxicab had a right to presume that an ordinary prudent man would bring his automobile to a full stop and obey said ordinance, that in approaching said intersection he, himself, must have driven his taxicab as an ordinarily prudent driver would have driven under the same or similar circumstances and not have exceeded the maximum speed of 15 miles per hour, if they believed from the evidence that such intersection was in the business section of Danville.

Neither should this instruction have been given for the reason that the record shows by the testimony of Meeker, the driver of the taxicab, that he did not know whether the plaintiff stopped her automobile or not, before entering the intersection, as he said the first he saw of it was when it shot up in front of him. Not having seen plaintiff approaching the intersection he could not have presumed that plaintiff would stop and the ordinance be obeyed. The evidence fails to show he regulated his conduct in any degree by any such presumption, or was misled in any way, or induced to act in any manner by anything done or omitted to be done by plaintiff. Munns v. Chicago City Ry. Co., 235 Ill. App. 160.

Instruction No. 6 is improper as it instructs the jury that they would not be justified in finding a verdict for the plaintiff unless they believe from the evidence that the driver of the taxicab did something that he should not have done or failed to do something that he should have done as complained of in the complaint. This instruction is indefinite and not clear and the jury were left to determine for themselves what things charged in the complaint were legally necessary to be done or what things the driver legally failed to do that should have been done to create a legal liability for which the plaintiff brought suit.

Instruction No. 9 was as follows: "It is not every accident which makes a person liable for damage for a personal injury. If the accident was unavoidable so far as the defendant is concerned, then no liability is incurred by him, whether as a result of it a person is lightly or seriously injured, and if in this case the jury believe from all the evidence and under the instructions of the court, that so far as the defendant is concerned, the injury to the plaintiff was unavoidable, then the jury should find the defendant not guilty."



The jury are instructed that if the accident was unavoidable so far as the defendant was concerned, then no liability is incurred by him, and were further instructed that if the jury believe from the evidence that so far as the evidence is concerned, the injury to the plaintiff was unavoidable, then the jury should find the defendant not guilty. There was no evidence in the record upon which to found such an instruction as the defendant did not drive the taxicab, and so far as he was concerned the jury would be compelled to find that the accident was unavoidable, and would be compelled to find a verdict of not guilty as to the defendant.

Had the taxicab driver been substituted in the instruction in place of the defendant, as was probably intended, it would have been erroneous, as it fails to instruct the jury that they must first find from the evidence that at the time in question the taxicab was being operated in a reasonably prudent and careful manner and that the driver did all that a reasonably prudent person would have done under like circumstances. It is also bad because it was in effect an argument on behalf of defendant.

By instruction No. 11 the court instructed the jury as follows: "The court instructs you that in this case the employee of the defendant is a competent witness in this case, and you have no right to disregard the testimony of an unimpeached witness, sworn on behalf of said defendant, simply because such witness was or is an employee of the defendant, but it is the duty of the jury to receive the testimony of such witness, in the light of all the evidence, the same as you would receive the testimony of any other witness, and weigh it by the same principles and tests by which you determine the credibility of any other witness."

It was error to give this instruction as it singled out Meeker and informed the jury that he was unimpeached, and gave undue prominence to his testimony. It is for the jury to pass upon the credibility of the witnesses and the giving of this instruction invaded the province of the jury.

Defendant's instruction No. 15 directed a verdict

and is as follows: "You have no right to assume or presume negligence on the part of the defendant or the driver of the taxicab, from the mere fact alone that an accident happened or in which the plaintiff may have been injured. Neither have you any right to assume that the plaintiff, herself, at and just before



the time of the accident in question, was in the exercise of due care and caution for her own personal safety. These are all material elements in the plaintiff's case and without affirmative proof on her part she is not entitled to recover."

In the case of West Chicago St. Ry. Co. v. Petters, 196 Ill. 298, the trial court refused to give the following instruction: "The court instructs the jury that no presumption of negligence arises against the defendant from the mere fact, of itself, that the plaintiff was injured in connection with the defendant's cars." The Supreme Court said of this instruction: "This class of instructions, which select one item of evidence or one fact disclosed by the evidence and state that a certain conclusion does not follow, as a matter of law, from that fact, are calculated to mislead and confuse the jury. If an instruction of this nature were held proper, it would be possible for a defendant to select each 'mere fact' constituting the entire chain of facts by which negligence was proved, and enable the court to instruct the jury that each of these links in the chain did not, of itself, constitute negligence, yet the whole, taken together, would, and thereby the court would be enabled to instruct the jury on the facts and take away the consideration of facts from them."

It cannot be said as a matter of law that no presumption of negligence arose from the mere happening of the accident. The question was one of fact for the jury. Cohen v. Weinstein, 231 Ill. App. 84, 101.

For the errors indicated the judgment of the circuit court of Vermilion County is reversed and the cause remanded to said court for a new trial.

Reversed and remanded.

(Seven pages in original opinion.)

IN THE

APPELLATE COURT OF ILLINOIS

Fourth District October turn a d. 1938.

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ARCHIE W. HOLEMON

Plaistiff-Appelles,

Defendant-Appellant.

Appeal from City Court of East St. Louis

vs.

ROYAL NEIGHBORS OF AMERICA,

Hongrable

W. P. Borders, Judge Fresiding.

Stone, J.

This is an appeal from a judgment of the City Court of East St. Louis in favor of plaintiff-appellee, Archie W. Holemon, and against defendant-appellant, Royal Neighbors of America, in a suit on an insurance policy. This case was previously considered by this court in HOLEMON v. ROYAL NEIGHBORS, 292 Illinois Appellate 648. The judgment of the City Court in favor of the plaintiff was reversed and the cause remanded for a new trial.

In its previous decision, this court held that the answers to questions in the application for insurance, which was a part of the policy sued on, were warranties and that if shown to be false there could be no recovery on the contract even if the statements were innocently made. This court further held that a part of the answers were felse. The plaintiff contended that even though the answers and statements were warranties and were false, the judgment should be sustained for the reason that the medical examiner was the agent of the insurer and that he filled in the blank spaces in the report without first obtaining the information from the insured. We found that the witnesses for the plaintiff were not able to identify the medical report introduced in evidence by the defendant-appellant as the one they saw the insured sign at Dr. Hulick's office. We held that the plaintiff had failed to make the necessary proof to support the contention that the answers were not the answers of the assured. We do not find

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ROYAL NELGHBORS OF AN MICK,

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Stone, J.

This is an appeal from a judyment of the fitty Seart of Mast St. Louis in favor of plaintiff-appells, archis W. Molemon, and against defendent-uppellant, Royal Weighbors of America, in a sait on an insurence policy. This care as previously considered by this court in Halkinght. Weight Dilling Appellate Sas. The judgment of the fitty Court in Rayor of the plaintiff the reverse of the reverse of the plaintiff the reverse of the plaintiff the reverse of the plaintiff the reverse of the reverse of the plaintiff the reverse of the reverse of the plaintiff the reverse of the reverse o

In its previous decision, this court hald the title and a du to overtions in the spalie than for insurance, which is a part of the policy suct on. To were entire and the buff shown to be false there ends be and covery of the orth of aven if the statements the inscensiy acce. This court forture held that a pirt of the and in files. The little one sinema' ' a same one so that neve tent bebre too werranties and sere false, the just ment as a such thed for the reason that the redical assumers are the of the insurer and that he filled in the olars words in the report without first obtaining the information from the insured. We frund that the witnessed for the Calabia or and black -05 and to medical remort introduced in evidence by the dofend nt-appellant is the one they sure through alon it Dr. Hulick's office. We held that the lainti " and the to make the necessary proof to succept the cur till the to that the evidence presented at the second trial on this point is any different from that presented before. The plaintiff's theory apparently was that since only a "few" questions were asked of the assured, and since there were many questions on the application, the examining physician could not have asked the assured all of the questions which are answered on the application. There are only two witnesses on this point, the plaintiff and a Mrs. Miller. They apparently do not agree whether a question was asked concerning the occupation of assured's husband. The evidence discloses that the assured might have been at the office of the doctor at other times than the time when the application was signed. It is apparent that certain information as to weight and measurement of the assured was obtained at another time.

This court is bound by its previous decision in the matter that the statements were warranties and that the statements were false. The only question presented is whether the plaintiff has made the necessary proof to support the contention that the answers in the application were not the answer of the assured. We find that the plaintiff has failed to make this proof.

The judgment of the trial court is reversed. Reversed.

Abstract

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